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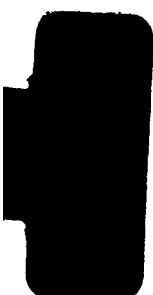
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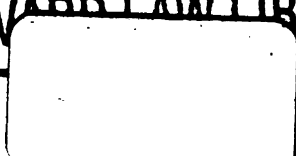
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161  
JAN 17  
VERMONT SUPREME COURT  
REPORTS

OF

## CASES

ARGUED AND DETERMINED



## SUPREME COURT

OF THE

STATE OF VERMONT.

REPORTED BY THE JUDGES OF SAID COURT, AGREEABLY TO A STATUTE  
LAW OF THE STATE.

6

VOL. VIII.

VER  
1837  
VER

MIDDLEBURY:  
KNAPP AND JEWETT, PRINTERS.  
1837.



JUSTICES OF THE SUPREME COURT, AND EX OFFICIO CHANCELLORS  
OF THE COURT OF CHANCERY, DURING THE TIME  
EMBRACED IN THESE REPORTS.

—•••—  
CHARLES K. WILLIAMS, *Chief Justice.*

STEPHEN ROYCE,  
SAMUEL S. PHELPS,  
JACOB COLLAMER, } *Assistant Justices.*  
ISAAC F. REDFIELD, }

# ERRATA.

- PAGE 17, line 5, from bottom for "provde" read *proceed*.  
 " 28 " 12 " top for "on" read *an*.  
 " 139 " 6 " bottom, for "pear" read *to appear*.  
 " 136 " 6 " " for "for" read *far*.  
 " 160 " 1 " " for "al" read *altho*.  
 " 224 " 15 " top for "legislation" read *legislature*.  
 " 232 " 8 " bottom for "collison" read *collusion*.  
 " 281 " 14 " top for "iltera" read *litera*.  
 " 377 " 24 " " for "1836" read 1826.  
 " 398 " 13 " bottom for "soimempotence" read *no importance*.  
 " 301 " 13 " top in note for "avoidable" read *available*.  
 " 317 " 13 " " for "sveas" read *saves*.  
 " 401 " 9 " bottom for "so" read *to*.  
 " 381 " 10 " bottom for "no" read *an*.  
 " 290 in marginal note for "Price" read *Prince*.

AN

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# REPORTS.

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## CHITTENDEN COUNTY,

JANUARY TERM, 1836.

---

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

“ STEPHEN ROYCE,<sup>1</sup>  
“ SAMUEL S. PHELPS,  
“ ISAAC F. REDFIELD,<sup>1</sup> } *Assistant Justices.*

---

### EMERSON & ORVIS *vs.* JASON WASHBURN.

The plaintiff in ejectment on mortgage, when defendant obtains a decree of foreclosure and time to redeem, is entitled to take his writ of possession and *execution for costs* on the expiration of the time set for redemption and the terms of the decree not complied with.

The day of the expiration of the time set for redemption, is the day of *final* judgment; and the day following, being the first day on which plaintiff is entitled to execution, is the first of the sixty days within which plaintiff must aver a *non est inventus* return on the same in order to charge bail on *mesne* process.

The bail in such case are not discharged by the operation of the decree either on the ground that it extends the time more than sixty-days from the rendition of final judgment, or that the costs are merged in the decree.

This was an action of *scire facias* against bail on *mesne* process. The original suit was ejectment for lands mortgaged by one Guy C. Burnham, to the plaintiffs. The body of the mortgagor being attached, this defendant become bail. After judgment for the plaintiffs in the original suit against Burnham for the seizin and possession of the premises demanded, he interposed his motion under our statute for time to redeem, upon which the usual decree was made and the usual time given. After the expiration

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of the year given to redeem, and no redemption, the plaintiffs, in less than thirty days, caused the writ of possession and *execution for costs*, to be put into the hands of a proper officer and a *non est inventus* to be duly returned. The declaration was drawn with usual formality. The defendant in the court below demurred generally and the plaintiffs joined.

The county court rendered judgment that the declaration is sufficient and the plaintiff recover, to which the defendant took exceptions and the question comes before this court for revision.

*Mr. Hill for defendant.*—1. In this case the *scire facias* was not issued within one year from the time of rendering the final judgment which is necessary.—Rev. Stat. p. 66, sec. 29.

2. The execution must be taken out within thirty days from the time final judgment is rendered and put into the hands of some officer proper to levy and serve the same.—Rev. Stat. p. 68, sec. 34—do. p. 87, sec. 95—do. 93, no. 8.

3. The decree includes the amount due in the condition of the mortgage deed, and the cost of suit. The court can make no other valid decree in the case.—They have got the land and that discharges the bail.—Rev. Stat. p. 80, sec. 76—do. p. 95, no. 13.

4. The judgment in the action of ejectment is satisfied by their taking the land, and if they prove any further claim they must sue Burnham, and cannot pursue the bail.—3d Vt. R. 581.

*Mr. Maeck for plaintiff.*—The declaration being demurred to generally, the only question is, whether it sets forth in substance a good cause of action against the defendant. It is believed that the defendant can raise but two objections of any plausibility against the plaintiff's action. 1. That the execution did not in fact issue within thirty days from the time judgment was actually rendered. 2. That plaintiffs having taken possession of the land, it operates as a satisfaction of the debt and costs against his principal.

The first objection might be easily answered independent of the act of 1804, Stat. p. 98. But that statute, framed for the purpose of meeting this case among others, affords a conclusive answer to the objection. This act enacts that the day on which a plaintiff shall first be entitled to his execution on a judgment in his favor, shall be deemed as the time in which judgment is rendered for the purpose of charging the bail. The act embraces this case, and the plaintiff's declaration shows he has complied with its provisions.

The second objection cannot avail the defendant. He contends that under this statute, if the mortgagee enters by force of a writ of possession, he takes the land in full satisfaction of his debt and costs, whether it is worth more or less than the debt, or if he proceeds in the collection of the costs, it opens the decree. Neither of these positions are well taken. It is now well settled law that if the mortgagee enters into possession of the land by the assistance of the court it discharges the debt *pro tanto* only.

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Even if the taking possession in this case would discharge the debt and costs, provided the land had been worth the amount, the defendant can only avail himself of such defence by plea. Whether it was or was not worth the debt and costs is a traversable fact, and cannot be ascertained on demurrer.

If the above reasoning is correct, it is quite immaterial for the determination of this suit what may be the effect of collecting the costs. The right is unimpaired by the effect. But if the effect is to open the decree, it is a question of great practical importance. We contend that we have the right to collect the costs, and if we exercise it, we do not disturb the decree.

Admitting that it might be difficult to maintain our construction of the statute, if the matter were *res integra*, still a contemporaneous and continued usage has furnished a construction which ought to prevail, especially where great mischief would follow if a different construction were to prevail. The statute has been in operation 38 years, and our construction has received the express assent of the expounders and implied assent of the makers of the statute.—*Rogers vs. Goodwin*, 2 Mass. 475.—*Packard vs. Richardson*, 17 do. 144.—1 Swift's Dig. 13.—2 Coke's Inst. 11.—5 Cranch, 22, — vs. *Delancey*; and in Cranch 299, it was held that a contemporaneous exposition of the meaning of the U. S. constitution, adopted in practice and acquiesced in for 12 years, had fixed its meaning and the court refused to control it.

The mischief and inconvenience of a different interpretation of the statute would be great. The uniform practice has been to collect the bills of costs with the writ of possession under the supposition of all parties that it was legal and did not disturb the decree. When the construction of a statute is doubtful, arguments drawn from inconvenience will have great weight. The same arguments will apply with greater force when the statute has once received a construction to give a different one.—3 Mass. 221.—do. 539.

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The opinion of the court was delivered by

REDFIELD, J.—The only question to be decided in the case is, whether the liability of the bail was discharged by the operation of the decree of foreclosure in the original suit.

It is contended, that, as the decree operated to stay the execution for one year after the judgment in favor of the plaintiff, it of necessity discharged the liability of the bail. Our statute requires the plaintiff within sixty days after the rendition of *final* judgment, to cause a return of *non est inventus* to be regularly made upon the execution, issued upon the judgment, which execution shall be taken out and put into the hands of some proper officer within thirty days from the rendition of judgment.

The first inquiry is, when does a judgment of the character named in the original suit, become *final*, within the fair construction of this statute. The judgment that the plaintiffs recover the seizin and possession of the land sued for, whether rendered by default or by consent, would be merely *interlocutory*, and in no sense final, unless the plaintiff waived all claim for mesne profits, which by our statute he is entitled to recover in ejectment, and the defendant waived the right to call upon the court for time to redeem. All judgments at common law and in our practice, which only fix the plaintiff's *right* to recover, but without fixing the extent of his damages, are merely *interlocutory*, as judgments by default or upon demurrer, or for want of a proper plea, or in proper time—or by *nihil dicit* or *non sum informatus*, when damages are to be assessed. The judgment in this case, in the first instance, was clearly of this character, and could not be in any sense treated as a final judgment until after the decree.

After the decree, the statute provides that the execution shall be stayed during the time limited, and in case of payment of the sum due, the judgment “shall be vacated.” It is here treated as a judgment but not a final judgment. It is one depending upon a contingency for its effect, and is no more final in its character than if the suit had been continued for assessment of damages, or passed to the supreme court under a rule that judgment shall be vacated and entered for the opposite party, if that court should consider there was error in the judgment below; until the contingency had occurred the judgment could not become final. And we consider this judgment as merely *interlocutory* or conditional until the expiration of the time limited in the decree. This was the earliest time at which the plaintiffs would be entitled to an execution. And if any doubt could be entertained in regard to the views just

taken of the case, the statute passed upon this subject, which provides that the *day* on which the party is first entitled to his execution, shall, for the purpose of charging bail, be considered the day of the rendition of the judgment, most manifestly both in terms and in rational construction, includes this case. So that in any view it cannot be said the plaintiffs have lost their remedy against the bail by the suspension and stay of execution.

WHITE DEN,  
January,  
1838.

EMERSON &  
ORVIS  
ES.  
Washington.

The consideration that this stay of execution is on motion of the defendant, and that the court have no discretion, but to fix the time of redemption and order stay of execution, still more forcibly induces us to decide that the lapse of time merely does not release the bail. For if so, the defendant might always, after any amount of cost had accrued, by litigation of the suit, interpose a motion which should effectually exonerate his bail, without the consent of the plaintiff or the order of the court, which cannot be admitted.

The extreme case of the decree extending the time of redemption through a period of years, might sometimes occur. If so it would be only the chance which every man incurs who enters a court of justice, either as party or bail. The period of the final determination of matters in course of adjudication is necessarily uncertain. If one assumes the liability of bail, he does it with this reasonable expectation, and if he considers his liability more than he is willing to sustain, the law provides a ready release by committing the principal.

But it is contended that by the operation of the decree, the costs were so far merged, that the plaintiffs were not entitled to include these in their writ of possession. This is not in accordance with the contemporaneous construction of this statute, and long established practice under it. It has always been considered that the plaintiff, after the expiration of the time limited for the redemption and the terms of the decree not complied with, was entitled not only to his writ of possession, but to his execution for costs. And such has been the uniform practice, *sub silentio* perhaps, for so long a course of years, that we should not now feel at liberty to depart from it, unless the terms of the statute clearly required such departure, in order to restore it to its legitimate operation.—*Stuart vs. Laird* (1 Cranch 299) 1 Pet. Cond. 316.

And from a fair construction of the statute, it does not seem to admit of much question that such was the intention of the framers. The costs are indeed to be included in the decree. For no rational construction would admit that the defendant might redeem the

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premises and thus relieve them from the lien created by the mortgage, until the costs as well as the debt were paid.

But if no payment of the sum stated in the decree is made, what is its effect? It is not such a merger of the original cause of action as results from a judgment in a personal action upon the securities described in the condition of the mortgage. The plaintiff may or may not take possession of the land. If he do, it is only at most payment *pro tanto*, in the ratio of its value to the sum due. If the land be not of value adequate to the full payment of the debt, the plaintiff may pursue his mortgage securities and collect the difference, or if the defendant does not see fit to claim the offset of the land, it may be considered as opening the decree. But in no event is taking possession of the land under the decree payment of the sum stated, unless it appear that the land was of value sufficient for the purpose. And this must appear by showing on the part of the defendant, which is not attempted here. If the defendant had here relied upon that, it should at all events be presented by plea.

But the court think that the legislature did not intend to put the cost on the same footing with the money secured by the mortgage. The cost accrues in consequence of defendant's neglect to surrender possession, which he is bound to do on condition broken. The decree is made at the request and for the benefit of the defendant. The costs not having accrued in consequence of the plaintiff's application to have defendant's right of redemption foreclosed, are on different grounds from costs in chancery on bill for foreclosure by mortgagee. And from every view we have no doubt the plaintiff in this case is entitled to his *scire facias* against the bail for the recovery of the costs.

The judgment of the county court is therefore affirmed.

SILAS B. SIBLEY *vs.* JOSEPH STORY.COMMITTEED,  
January,  
1836.

If an officer attach property and bail it to a receipt man, who refuses to redeliver it on request, he may sustain trover against such receipt man.

Sibley  
*vs.*  
Story.

This was an action of trover for a horse. Plea, general issue.

To support the issue on his part, the plaintiff introduced the following receipt :

"Received, Milton July 30th, 1833, of S. B. Sibley, constable of Milton, one grey stud colt, four years old, valued at one hundred dollars, attached at the suit of Francis Roe *vs.* Silas Smith, jr., demanding in damages fifty dollars which I promise to deliver S. B. Sibley or bearer on demand, or pay said debt and all costs on account of not delivering said property."

(Signed)

JOSEPH STORY."

And on the back of the receipt was the following endorsement :

"I hereby acknowledge a demand of the property named in this receipt made by Silas B. Sibley, constable of Milton, 20th Sept. 1834."

(Signed)

JOSEPH STORY."

The plaintiff also introduced the record of the original attachment, judgment and execution, in favor of Roe *vs.* Smith, which showed the judgment to be regular, and the execution issued in due season to hold the property. The defendant contended that the action of trover could not be sustained, that plaintiff's cause of action was substantially a contract made in the alternative, and the action should have been on the contract. It was admitted that the defendant refused to redeliver the property upon the demand of the plaintiff, claiming the horse by purchase of said Smith previous to the attachment. The objections were not sustained by the court, and judgment was rendered for plaintiff. To which defendant excepted. Exceptions allowed and the case ordered to supreme court for revision.

*Mr. Maack for defendant.*—On the evidence, as it appears from the bill of exceptions, this action cannot be maintained. In the case of a tavern keeper, tailor, wharfinger, agister of cattle, and common carrier, it is not to be denied that if they convert the articles, delivered them to keep merely, to their own use, trover can be sustained. But in all these cases it will be observed the contract in point of law and fact invests the receiver with no other power over the goods except to keep and redeliver to the owner, and consequently a disposition of them is a breach of duty and direct tort.

CHITTENDEN,  
January,  
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Sibley  
vs.  
Story.

But when a power of sale is either expressly given by the contract of the parties or can reasonably be inferred from the nature of the transaction, trover cannot be sustained for the articles, though the power is not strictly pursued.

It cannot be sustained against a broker or factor who has positive orders not to sell under a certain price, and sells below the price; but the remedy is an action on the case.—3 Taunton 117, *Deufresne vs. Hutchinson*.

If the receipt had stopped at the word "demand," the action could not have been sustained. By the custom and usage of the country from the fact that a sheriff has delivered over property to a receiptor, a power of disposition is implied. The receipt is substituted for a replevin bond and if the goods had been replevied and not redelivered to the officer, it cannot be pretended he or any one else could maintain trover for them. The receipt is a mere indemnity to the sheriff, and if the property is not redelivered, the officer looks to the receiptors, and it is not necessary for him to show the receiptors have actually received the property.

But when the receipt contains the stipulations the one in question does, it is absurd to contend the officer may maintain trover if the property is not redelivered. A power of sale is expressly given on the face of it. The undertaking of the defendant is, that he will deliver the property or pay the debt and costs. It was a conditional contract in the outset that the defendant might treat this property as his own if he pleased, and the condition was not that the debtor would pay for the property itself at its actual value, but that he would pay the debt and costs which might be recovered against Smith, if he did not return it. The paying the debt was not a condition precedent to the power of disposition, but it was a consequence of exercising the power.

Whether the officer had the right of so disposing of the property cannot be material as regards the parties. If he committed a tort as respects the debtor, by so disposing, it cannot convert a contract between him and the defendant into a tort. Such receipts are private contracts between the officer and receiptor.—*Clarke vs. Clough*, 3 Greenleaf 357.

*Mr. Hill for plaintiff*.—It is well settled that an officer who has attached goods on mesne process, may maintain trover against any one who shall meddle with them unlawfully.—3 Dane Ab. 189; 1 Mod. 31-2; Saunder's R. 47; 1 Pick. R. 395.

2. An officer who attaches hay, &c. and leaves a copy with



the town clerk, can maintain trover if any one converts it.—4 Vt. R. 76.

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3. The very denial of goods to him that has a right to demand them, is an actual conversion.—Hall C. J. 6 Mod. 212.

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4. When goods are lent or delivered to another to keep, and he refuses to deliver them on demand, trespass does not lie, but the proper remedy is trover.—1 Chit. Pleadings, 157; Sir Thos. Ray, R. 472; 2 Saunder's R. 47; Bull, N. P. 44; 2 Phil. Ev. 148, and note.

5. Where an agent has rendered himself liable for a non-feasance or mis-feasance, the principal may, at his election, have an action of assumpsit or case.—1 Livermore on agency, 375; Cites 4 Bos. and Pul. 43; 6 East. 333; 3 East. 62.

6. An action of trover will not lie for a bare omission, but there must be some positive act of the defendant to constitute a conversion.—1 Livermore on agency, 385; Cites Salk. 655; 5 Burr, 2825; Bull N. P. 45; Taunt. 841; Vt. 223.

7. Trover will lie against a common carrier for non-feasance or mis-feasance.—2 Wils. 319. Also for delivering goods to a wrong person.—1 Livermore on agency, 379; Peake's N. P. R. 49. Also against a wharfinger who refuses to deliver goods where he has no leave.—3 Danes Ab. 208.

8. The supreme court of this state have decided that a sheriff does not part with the right of possession to property which he has attached and put into a man's hands and taken a receipt for it. 1 Daniel Chipman's R. 51; 4 Vt. R. 605; 5 Vt. 263. There it follows as a matter of course, that if Sibley could have gone and taken this horse the next day after taking the receipt for him, (for the courts say he had a right to take him any time without the consent of the receipt man. 4 Vt. R. 607,) he could then make a demand and a refusal would give to him the action of trover according to the reason given.—3 East. 62; 1 Cowen R. 322.

9. It never was the intention of the plaintiff to part with the property, by taking the receipt, for it is expressly agreed to redeliver it on demand to Sibley or bearer.

10. But when the demand was made and defendant refused to deliver the property or to pay for it, there was a conversion, and the plaintiff had his election to provide in tort or assumpsit.

11. It is no disadvantage to the defendant for the plaintiff to commence his action in trover, but it is an advantage. He can now show that the horse was his, (which he attempted to do) which he could not do, had the action been brought on the

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receipt. He might show in this form of action that the affair took no property into his possession.

12. It takes away from the defendant no defence that he might make in assumpsit. In fact he can show every thing under the plea of not guilty.—3 Dane Ab. 205.

13. It is much the most convenient mode of practice and ought to be sustained by the court, if it does not give to the plaintiff advantages which he would not have in assumpsit and take away advantages from the defendant.

The opinion of the court was delivered by

REDFIELD, J.—The only question arising upon the bill of exceptions is, whether trover be the appropriate remedy in this case. There can be no doubt assumpsit will lie, upon such a receipt in the name of a deputy sheriff even, when so expressed in the receipt. The bailing of property attached on *mesne* process to a receipt man, so common in our practice, is not so far an official act of the attaching officer, that he is bound to make the bailment on request of the debtor; and still it is so far official in its character, that the sheriff may claim to have made the bailment through his deputy, and may maintain an action for the non delivery on request, in his own name.—*Davis vs. Miller*, 1 Vt. Reps. 9; *Spencer vs. Williams et al.* 2 Vt. R. 209. There can be as little doubt that the sheriff or his deputy or any other officer, making an attachment, whether they have the actual custody, or have bailed the property to a receipt man, or have only a constructive possession by operation of law, as is the case with those articles of personal property not required by our statute to be removed, in order to constitute an attachment, e. g. hay, grain, &c., (*Lowry vs. Walker*, 4 Vt. R. 76; same case reconsidered, 5 Vt. 181) may sustain trover against any one guilty of converting the property.

It is indeed a well settled rule of common law, that a mere depositary of goods is liable, in trover, for any abuse or even use of them, and equally for refusal to deliver the thing bailed to the bailor on request.

But a bailee for use is not liable in trover for a mere abuse of the chattel, but the appropriate remedy is trespass on the case or assumpsit.—1 Saund. 47, No. 1; 1 Ch. R. 650. But in this case if he refuse to redeliver the thing bailed or put it to another and different use from that for which it was bailed, he is guilty of a conversion and liable in trover. A nice distinction is taken in the books between *mis-feasance* and *non-feasance* by the bailee. In the

former case the bailor may, at his election, bring assumpsit case or trover, but in the latter case trover will not lie. After the bailment is determined either by its own limitation or the act of the bailee, the law considers the several species of bailment as resulting in a naked deposit, and trover will always lie after demand and refusal; and trespass even, when the bailment is determined by the bailee destroying the subject of the bailment. These principles are too well settled and too familiar to require discussion.—Story on B. 74,—84, 93, 1 Chitty on Pl.

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In this case, if the plaintiff had merely delivered, the property to the defendant for safe keeping, it would hardly be contended he could not sustain trover against him for converting it to his own use.

And the common receipt taken in these cases is not intended to vary the obligation resulting from the relation, and in fact does not. In such case it has always been held here that the officer might bring trespass or trover against a stranger who wrongfully interfered with the property, while in the possession of the receipt man.—*Bedlam, executor, vs. Tucker*, 1 Pickering 395; *Sudden vs. Lovitt, ubi infra*; *Gibbs vs. Chase*, 10 Mass. Rep. 104; *Gates vs. Gates*, 15 Mass. 310; *Brownell vs. Manchester*, 1 Pick. 389.

It has been decided in Massachusetts that the receipt man is a mere servant of the attaching officer and has no such interest as will enable him to maintain an action of trespass or trover against a mere stranger.—*Waterman vs. Robinson*, 5 Mass. 303; *Sudden vs. Lovitt*, 9 Mass. 104; *Ib.* 265; 14 Mass. 217, *Commonwealth vs. Morse*.

But although it be conceded that the doctrine (in *Barrows vs. Stoddard*, 3 Conn. 160) that the receipt man may bring trover or trespass for any wrong done by a stranger to the property while in his possession, or that of his servant, is more in analogy to the settled principles of the right and duties of bailees in other cases, which is undoubtedly true, still, it must be admitted that the cases in Connecticut, (*Burrows vs. Stoddard*), and also in New York, (*Mitchell vs. Hinman*, 8 Wendell —) and especially the Mass. cases cited above treat the possession of the receipt man as being the possession of the officer.

It is well settled that the mere depositary of goods has no property in them.—*Hartrop vs. Hoare*, 3 Atk. 49; Story on bailments, 72, 73; *Isaac vs. Clarke*, 2 Bulstrode R. 306, 311.

But it is equally clear that the bailee, under such circumstances, may maintain trover against a mere stranger.—Same cases and

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The receipt man has a mere naked custody and no property in the thing receipted, any more than any other depository.—*Norton vs. Rofle*, 8 Cowen 137.

The officer has a right to resume the actual custody at any time. *Pierson vs. Hovey et al.* 1 D. Chip. 51; *Beach vs. Abbott & Blodget*, 4 Vt R. 605; *Rood vs. Scott et al.* 5 Vt. R. 263; *Philips vs. Bridge*, 11 Mass. 242.

In short, the receipt man is at most the temporary bailee of the property, with the right to use it by consent of the debtor, but liable at any time to be called to account and guilty of converting the property by any abuse or wrongful use or refusal to deliver on request. These principles are too well settled by repeated adjudications, *sub silentio* indeed, and a uniform course of practice for too long a time to be now brought in question.—*Bedlam vs. Tucker*; *Lockwood vs. Bull*, 1 Cowen 322. In New York the form of action is generally trover. It has been brought in this state as often, it is believed, as any other form of action in cases of this character. The same is true of Connecticut and Massachusetts. And we here decide that trover is the appropriate remedy.

But it is attempted to liken this to the case of a bailment with a power of sale. And this is attempted to be inferred from the stipulation of defendant, being in the alternative, and not fixing the value of the property as the measure of liability, but the amount of the debt and costs.

This does not vary the case. In no sense can this be construed a "power of sale." The plaintiff could confer no such power. If he could have done, it is in vain to infer one from the terms of the contract. No such power is expressed or was intended to be, so that any analogy, which was attempted to be shown between this and the case of *Sergeant vs. Blunt*, 16 Johns. 74, or 3 Taunt. 117 *Dufresne vs. Hutchinson*, where it was held trover, will not lie against an agent for selling goods intrusted to him for sale, below the price at which he was required to sell by his instructions, wholly fails.

It is believed that this receipt is in the form in which many years since it was most common to express the liability. It is intended to express, in definite terms, the extent of defendant's liability to plaintiff. It was natural defendant should wish it so draughted. It was but reasonable plaintiff should consent to such a limitation, as long as the defendant was the friend of the debtor,

and the property would doubtless go immediately into his possession, so that plaintiff would hardly be called upon to take any indemnity against a possible liability over to him. There being no error in the proceedings below.

Judgment is affirmed.

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**ASA ALDIS, Ex'r of SANFORD GODCOMB, vs. JUSTUS BURDICK.**

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A substantial compliance with Judge Chipman's forms of levy of an execution on real estate is sufficient to pass the title, and a literal compliance will not be required.

If a tenant of the debtor be in possession of land at the time of the levy of execution, and he continue in possession until the expiration of six months, and the land is not redeemed, he becomes the tenant of the creditor and the title all along is so far the same, that as between the debtor and creditor there is no adverse possession.

If there were an adverse possession it will not render void a conveyance by the marshall of the United States, such conveyance not coming within the intent of the statute, avoiding conveyances by reason of adverse possession.

If an executor or administrator declare on his own seizin, in an action of ejectment he must prove his appointment as a part of his title, but not so where he declares upon the seizin of his testator or intestate.

This case came into this court upon exceptions taken in the county court. The action was ejectment for lands in Burlington. The plaintiff declared upon his own seizin as executor, and the defendant pleaded the general issue. On trial the plaintiff gave no evidence of his appointment as executor, and the court held it unnecessary. Both parties claimed title from one Thaddeus Tuttle. The plaintiff relied upon the levy of an executor upon the land in favor of the United States against Tuttle, and a subsequent sale of the land to plaintiff's testator under instructions from the secretary of the treasury. The levy was dated the 31st day of March, 1817. The marshall's deed to plaintiff's testator was under date of 4th of August, 1819. It was shown on the trial in the court below, that at the date of the levy, one Thomas Gill was in possession of the land as tenant to Tuttle and continued to occupy until subsequent to the date of the deed aforesaid, and on the 20th of August, 1819, he in writing formally acknowledged himself tenant of the land under plaintiff's testator.

The defendant relied upon certain defects in the levy. The levy was in these words: "Know all men by these presents, &c.

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It appeared that Gill continued to hold possession of the land until 1824 or 1825.

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The plaintiff also gave in evidence copies of regular deeds of conveyance of the land from Tuttle to the defendant through Charles Adams.

The county court rendered judgment for the plaintiff to which decision the defendant excepted and brings the case here for revision.

*C. Adams for Defendant.*—I. Plaintiff was not entitled to recover without the will as part of his title.—*Ex. Tucker vs. Starks*, Bray. 98.—*Clapp, Ad.*, vs. *Beardsley*, 1 Vt. 151.—*Seymour, Ad.*, vs. *Beach*, 4 Vt. 493.

II. And was avoided by adverse prosession.—*Blake vs. Howe*, 1 Aik. 306.

III. Plaintiff is barred by the statute of limitations.

1. Statute limitations extends to government as well as individuals.—*State vs. Weeks*, 4 Vt. 216.—5 Bar. Ab. 559.—*M. Chung vs. Silliman*, 3 Pet. 278.

2. The exemption does not extend to the United States.

3. The exemption is confined to original liabilities and does not extend to cases where the government succeeds to rights of individuals.—*United States vs. Bradford*, 3 Pet. 29.—*King vs.* — 6 Price Petersdorf.

IV. The levy of the execution was void.—*Smith vs. Runnels and Hunt*, 1 Vt. 148.—*Waterford vs. Brookfield*, 2 Vt. 200.—*Reading vs. Weathersfield*, 3 Vt. 349.—*Galusha vs. Sinclair*, 3 Vt. 394.—*Dodge vs. Prime*, 4 Vt. 191.—*Metcalf vs. Gillett*, 5 Con. 400.—*Mitchell vs. Kirtland*, 7 Con. 229.—*Coe vs. Stow*, 8 Con. 536.—*Cady vs. Knapp*, 2 Mas. 754.—*Whitman vs. Tyler*, 8 Mas. 284.—*Williams vs. Amory*, 14 Mas. 20.

*Mr. Mueck for plaintiff.*—1. The levy is substantially according to the established and approved form, and though the officer does not state that he administered the oath, yet the court will intend, that it was administered by the proper officer.—*Eastman vs. Curtis*, 4 Vt. Rep. 616.

So the officer having returned that the appraisers were mutually chosen by the parties, it does not lie in the mouth of the debtor, or of one claiming under him, to object that the appraisers were not duly appointed. If Tuttle was satisfied of the authority of the person assuming to act in behalf of the plaintiff, his grantee is bound by his acquiescence, and the court will not inquire who acted for the United States, especially as the the government has

recognized and adopted the act of the agent by conveying the land. CHITTENDEN,  
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2. The conveyance to the plaintiff's testator appears to have been made in conformity with the provisions of the act of congress.—1 Story's U. S. Laws, 775.

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3. All Tuttle's rights, both legal and equitable, being transferred by the levy to the government, and their grantee, the tenant of Tuttle might lawfully attorn to the grantee, and without proof of such attornment, it would yet be presumed, because possession is always *prima facie* subordinate to the legal estate. But if the possession of Gill is to be treated as adverse, yet as the statute does not run against the government, the computation of the fifteen years must begin at the time of the conveyance to Godcomb, and so the limitation had not run at the commencement of the action, nor was the deed from the marshall to Godcomb void by reason of the adverse possession, for in Vermont a deed is not avoided by adverse possession, but by force of the statute, and by that statute the government is not bound.

4. Upon not guilty, the executor need not show his authority. *Clapp vs. Beardsley*, 4 Vt. Rep. 151; *Prop. Soc. vs. Pawlett*, 4 Pet. U. S. R. 480; case of *Clapp vs. Beardsley*, 1 Vt. 151.

The court decide that the appointment of an administrator or executor cannot be questioned under the general issue; but it does not appear by that case whether the plaintiff declared on his own seizin or that of his intestate. It must have been on that of his administrator or the case is not law. For the law has been long well settled that if an administrator or executor declares in ejectment on his own seizin as in this case, he must show his appointment as a part of his title as much as if he claimed by deed from the testator. This distinction is recognized in all the books, and is adverted to by judge Mattocks with approbation in the case of *Barrett vs. Vaughn*, 6 Ct. 243.

The opinion of the court was pronounced by

REDFIELD, J.—The counsel in this case seem to have expected that the questions raised upon the merits of the case should be considered and decided by the court in order to dispose of the case, notwithstanding the court might be inclined against the decision of the county court, upon the question of not requiring the plaintiff to prove his appointment as executor under the general issue.

The levy is first objected to as being void. It is said the officer's return does not show that the appraisers were legally appointed. The words of the return are, that the appraisers were "mu-

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tually chosen and agreed on by the parties." The statute requires that when the appraisers are appointed through the agency of the parties, each party should select one appraiser and that they shall agree upon the third. Here they agree upon the three, who possess all the requisite qualifications. This is not only a substantial but a literal compliance with the statute. For if the party agree upon an appraiser he chooses him, so that each party, instead of choosing one appraiser, chooses two, and they agree upon the third. This was expressly decided in *Eastman vs. Curtis*, 4 Vt. 616. But it is said the United States, being a party to this levy, the return of the officer cannot be true, since no one appears to have been authorized to act on their behalf, and having no personal existence, they could not act of themselves directly and immediately. There can be no doubt congress might have appointed an agent for this purpose. The secretary of the treasury would have been authorized to act in this matter. And even if the district attorney be considered in the light of the attorney of record in actions between personal parties, and not on that account agents of the party for the purpose of the levy, still it being possible that the United States should have acted in this way, we consider the legal intendment that they did so act. And it is not now in the power of the judgment-debtor or his grantee, after having acquiesced in the authority of whomsoever claimed to act as agent, and proceeded with the levy without objection, to avoid the levy by showing, out of the record, a want of authority in the agent, the United States having all along acquiesced in the sufficiency of the agent's authority.

It is further objected that the appraisers were not properly sworn. The return is in these words: "sworn in due form of law." The expression found in judge Chipman's forms, in this respect, is very similar, "sworn according to law." These forms have, by repeated judicial determinations, been declared sufficient, and the departure here is too immaterial to warrant any distinction. The phrases, "in due form of law," and "according to law," must surely be equivalent. And the legal intendment of both is, that the proper oath was administered by the proper officer. Such have been the decisions in this state. This disposes of all the objections urged against the levy.—*Cleveland vs. Allen*, 4 Vt. 176.

No objection is taken to the form of the deed given by the marshal to plaintiff's testator. It is admitted to be in compliance with the requirements of the statute of May 7, 1800, then in force. But it is objected that the marshal's deed was void by reason of an ad-



verse possession ; the tenant of Tuttle having all along continued to occupy the premises. The possession of Tuttle or his tenant cannot in any sense be considered adverse to the levy, but after the six months has expired must be held to be only in subordination to the levy. So that at the time of the levy, Gill was in possession as the tenant of the United States. The fact of his not having then attorned makes no difference. Nor does his subsequent attornment in any way affect the relation, which by operation of law had already been created between Gill and the United States. After the expiration of the six months given for redemption, the law casts the seizin upon the creditor without any act on his part and gives him the possession of the debtor or his tenant with an immediate right of entry. And the debtor or his legal representatives, remaining in possession, are made liable for rents for the whole time. It would then be absurd to hold that the debtor's possession was adverse to that of the creditor, when the title and possession of both is identical.—Rev. Laws. Chap. 28, Sec. 6.

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The fact too that the conveyance by the marshal is a conveyance by operation of law and not by contract between the parties, clearly puts the case out of the statute. This point has been decided in relation to conveyance by the levy of an execution, while there was an adverse possession, and holds equally not only as to this case, but all cases where the title is transferred by operation of law. The statute in terms is confined to conveyances between party and party by their own contract and consent. It declares the deeds, bargains, &c. void.—*Farnsworth vs. Converse et al.* 1 D. Chip. 120.

It is apparent too that the statute of 1807, as its title imports "To prevent fraudulent speculations" &c. could never have been intended to affect a conveyance in any form either by the state or United States government. The sovereignty either entire, or as in case of the United States, the sovereignty *sub modo*, being so clearly not within the mischief to be remedied or the import of the statute, ought not to be affected by it.

This disposes of another point which was insisted upon at bar, that the plaintiff's title was barred by the statute of limitations. There being no adverse possession shown, the title would not be affected by the statute of limitations.

The only remaining question is whether the plaintiff declaring on his own seizin is bound to show his appointment as executor and the probate of the will under the general issue. And we have

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no doubt he is. When an executor or administrator declares upon his own seizin in that capacity he is bound, even under the general issue, to show his appointment as a part of his title, in order to make out his case.—*Mearsfield vs. Marsh*, 2 *Ld. Ray.* 824, *Hunt vs. Stevens*, 4 *Camp.* 272, *Saund. Rep.* 47.

When plaintiff declares on a seizin, in ejectment, in the life time of his testator or intestate, and the defendant pleads the general issue, plaintiff is not bound to show his appointment. And if the defendant would drive him to that, he must plead specially *ne unques &c.*

In the case of *Clapp, Administrator, vs. Beardsley*, 1 *Vt.* 151, it is decided generally that in ejectment on the general issue, the plaintiff who serves as executor or administrator is not bound to show his appointment. The case does not show whether the plaintiff counted upon his own seizin or that of his intestate. It was upon that of his intestate or the case is not law. For this cause the defendant is entitled to a new trial.

The probate of the will and appointment of the executor in due form being produced, judgment was affirmed.

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### GEORGE TYLER vs. GEORGE WHITNEY.

On the decease of either party in a suit pending, where by law the cause of action survives, the executor or administrator must enter at the next term of the court after his appointment, or it will be an abandonment of the suit. If the opposite party wish to compel the appearance of such personal representative for the purpose of obtaining judgment against the estate, he must serve a *scire facias* for that purpose returnable at the next term after the appointment of such personal representative, or he cannot compel such appearance.

This was a writ of *scire facias*, sued by the plaintiff against the defendant as administrator *de bonis non* of Roswell Butler deceased, requiring him to show cause why he should not be compelled to enter and prosecute to final judgment a suit commenced by his intestate against the present plaintiff, and which was pending at the time of his decease, in the county court for this county, the cause of action being one which by law survives in favor of the personal representative.

The defendant pleaded in bar of the process, in substance, that after the decease of Butler, his executors voluntarily entered and prosecuted the suit until their power was annulled by the decree

of the probate court in the month of March 1833; that at this time the defendant was by the probate court appointed administrator *de bonis non* on the estate; that these facts were then known to the plaintiff in this writ; that the defendant declined to enter and prosecute the suit of his intestate and that no proceedings were had therein, until the August term of said court, 1833, when this writ was served and returned, *two terms* of said court, having intervened between defendants appointment and the service of the writ of *scire facias*.

To this plea there was a general demurrer and joinder, and judgment for defendant and exceptions.

*Mr. Upham for the plaintiff*,—Contended that by the 61 section of the probate act of 1821, *the time for suing a scire facias to compel* the executor or administrator to appear and prosecute or defend the suit of his testator or intestate, is not restricted to the *next term* after the appointment, but is to be allowed within *any reasonable time*; and while the suit still continues upon the docket of the court, and no steps have been taken by the executor or administrator to discontinue the suit, it is not competent for the court to refuse the *scire facias*.

*Mr. C. Adams for the defendant*,—Contended, that as the statute gave the executor or administrator leave to enter at the *next term* after his appointment, if he omitted to enter, it was an abandonment of the suit; that the statute *in terms* limited the right of the opposite party to serve a *scire facias* and compel the executor or administrator to enter, to the *same time*, i. e. the *next term* after the appointment, and it could not by any possible construction be extended farther than to the term *next after the* executor or administrator had neglected to enter. That to extend it farther will be making it a mere matter of discretion with the court when the suit is pending, and in no sense subject to the supervision, correction or control of higher tribunals.

The opinion of the court was delivered by

REDFIELD, J.—At common law the death of either party operated a discontinuance of the suit, whether the cause of action did or did not survive.

To remedy this inconvenience, expense and delay, it is provided by statute in this state, that whenever the cause of action by law survives the decease of the person, the personal representative *may*, at the next term after his appointment, “enter, and prosecute or defend such suit to final judgment.” The terms of the enactment are, “shall have power to enter” &c. It is most manifestly

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left, at his election to enter and prosecute or defend the suit or to abandon it. If he do not enter at the *next* term after his appointment, he is not at liberty to appear and enter at any subsequent term. The *neglect* is *ipso facto*, an abandonment of the suit, and so far as the executor or administrator is concerned is a discontinuance.

But upon the suggestion of the death of either party, and no executor or administrator having been appointed, the cause is continued of course, until one be appointed.

And when there has been an appointment of such personal representative, it is by the same section of the statute provided that the surviving party may compel on appearance by *scire facias*, or in default of appearance, obtain judgment against the estate of the deceased party. The question then arises, and it is the only question to be decided in this case, when must the surviving party cause *this scire facias* to be served upon the executor or administrator? It is apparent, that he may do it at the next term after the appointment of such executor or administrator. For the right to sue the *scire facias* is not, by the statute, in any sense, dependent upon the *neglect* of the personal representative to appear. The right of the surviving party to sue the *scire facias* and thus compel an appearance; and the "power" of the executor or administrator voluntarily to appear are independent of each other, and concurrent both in their character and in time.

But it is contended that the statute has not limited the time for suing the *scire facias*. It has not in express terms. And it is only by implication that any writ of *scire facias* is given to the surviving party. The statute after providing that the executor or administrator "shall have power to enter" &c. "at the *next term* after his appointment," proceeds: "And if such executor or administrator, *after having been duly served with a scire facias*, issued from the court, to or in which such suit is commenced or pending, twelve days before the session thereof, shall neglect to become a party to such suit, such court may render judgment against the estate," &c. This clause following so immediately upon the former provision, and containing no express terms of limitation, would seem naturally to depend upon the terms of limitation adopted by the statute upon the former provision. Nor is there any inconsistency or impropriety in giving it that restriction, except in the case of there not being *twelve* days between the appointment of the executor or administrator and the term of the court; in which event he could not of course be compelled to appear un-

til one term had intervened. But this is an exception from necessity, and like other exceptions *ex necessitate* from the provisions of general statutes, is strictly *casus omissus*. The same would hold equally well of a possible case under the first clause, where the executor or administrator, residing in a part of the state remote from the court in which the suit was pending, and should receive his appointment but one day before the session. It would be impossible he should appear at the *next* term. This must be held as *casus omissus* or the party is without all possible remedy under the statute. In cases of this character, to prevent injustice and avoid absurdity in the construction of statutes, courts have always felt at liberty so far to extend the terms of the statute as to include cases manifestly within the intention of the statute, although not within its express letter; and also so to limit and restrict the terms as to exclude cases which happened to fall within the letter, but which in no sense came within the true spirit and intention of the legislature. But courts have for many years been extremely cautious in departing from the fair and rational interpretation of the words of a statute, out of regard to any supposed spirit or refined subtilty of metaphysical speculation upon the possible or even probable intention of the legislature. No departure is ever allowed except in a case which from necessity could not have been intended to be included within the comprehension of the statute.

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This clearly is not such a case. No good reason can be assigned why the surviving party, wishing to compel the appearance of the personal representative of the party deceased, should not be limited "to the next term after the appointment." The appointment is always matter of notoriety. It is the business of the party wishing to compel the appearance, to do it at the first opportunity. He clearly may do it at the first term after the appointment, except in the case mentioned as an exception, and we know of no sufficient reason for extending the natural signification of the terms of the statute in this case, so as to permit the party to sue his *scire facias* at any other term. No possible argument could be urged for giving the time a greater extension than *one term* after the *neglect* of the executor or administrator to appear. And we should certainly hesitate in giving it that extension; but here the plaintiff asks for an indefinite extension, which is at war with every principle of policy or sound construction. There is no sounder maxim of law or legislation, than *interest reipublicae ut sit finis litium*, and it is vain to say that the right to sue the *scire facias*, can be made to depend upon the discretion of the court,

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where the suit is pending, or the time the suit is retained on docket, which is the same thing. There is no power more dangerous or more difficult, than a discretionary power, to be exercised by judicial tribunals. It is one which the legislature would never confer, or the courts assume, except as a matter of strict necessity, which is not this case.

Judgment that the plea in bar is sufficient, and that the judgment of the county court be affirmed.

### ELWOOD IRISH vs. GEORGE CLOYES & H. S. MORSE.

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In trover the mere assertion of ownership of property without in any way interfering with the property, or with the owner's right to control it, is no evidence of a conversion.

A demand and refusal is such evidence of a conversion, in trover, as cannot be justified or removed, by showing a subsequent attachment or levy or a distress made upon the same property and a sale upon plaintiff's debt, but this will go in mitigation of damages.

In proceedings in our supreme court upon bill of exceptions, if there be error in the proceedings of the court below, although substantial justice may have been done, the party excepting is entitled to a new trial as a matter of right, and the court have no discretion to refuse it as they may and will in such cases, on petitions for new trials.

This being an action of trover for numerous articles of personal property, the only questions decided are upon the charge of the court below in relation to the evidence necessary to warrant the jury in finding a conversion in the case. The verdict was for the defendants, and the plaintiff among other things, excepted to the charge, in that part where the jury are instructed, that where a stranger applied to the defendants for their consent to purchase certain property of plaintiff and the defendants refused to give this consent, saying that they had already purchased the property of plaintiff and were the owners, the fact being admitted that the property belonged to plaintiff and was in the keeping of defendants merely for custody, was not evidence from which the jury could infer a conversion of the property. And Secondly, the plaintiff excepted to the charge because the jury were instructed, that when the defendants had certain property of the plaintiff in their possession for mere custody, and "*refused to give it up*" on request, without assigning, at the time, or pretending to have found at the trial any excuse for refusal, but soon afterwards, without the

consent of the plaintiff, turned the same property out to a constable who levied upon the same as plaintiff's, and after having adjourned the time of sale at plaintiff's request, finally sold the same, that this was not evidence from which the jury could infer a conversion of the property by defendants. These questions only have been decided by the court.

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*Mr. Briggs for plaintiff.*

*Mr. Marsh for defendants.*

The opinion of the court was delivered by

REDFIELD, J.—In relation to the first point decided by the court here, the question arose in reference to certain “mill logs,” which were on the land, conveyed by plaintiff to defendants. There was evidence in the case, that the plaintiff had also sold this lumber to defendants. But this point being controverted, it became necessary to inquire whether any sufficient evidence of a conversion by defendants had been given. The only evidence relied upon was, that after the conveyance of the land, some stranger wishing to purchase the logs, applied to defendants for permission to purchase them of plaintiff. The defendants refused to give any such permission or consent, on the alleged ground that they had already bought the logs of plaintiff. The case finds that the defendants had not in any other way whatever interfered with the property in question.

For the purposes of the consideration of this question it is to be conceded that the “logs” were the property of the plaintiff. And we have no doubt that the mere assertion by defendants, that the property belonged to them, is not in any sense evidence of a conversion, or from which a conversion can be inferred.

If this assertion had been made in plaintiff's presence and at a time when he claimed to take possession of the logs, and for the purpose of deterring him therefrom, it might merit a different consideration. But made as it was to a stranger, and not in the presence of plaintiff, or within view of the logs, it would be too much to say this is evidence from which the jury could be permitted to infer a conversion of the property by defendants.

This is in accordance with the decisions which have been had upon analagous cases. Any mere assertion of the *right* of dominion, is never permitted to go to the jury, in cases of trover, as evidence of a conversion, unless the assertion is made in view of the property, and in presence of the owner, and in order to deter him from exercising his just control over it.

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A demand and refusal are evidence of a conversion only when the defendant had, *at the time of the demand*, the actual custody of the property, so that he might have delivered it if he would. Hence in the case of title deeds, which had been, wrongfully pledged to an attorney but were in the custody of the attorney, it was held at *nisi prius*, and the decision has always been acquiesced in, that a demand upon the defendant and a refusal, under the circumstances, was not evidence of a conversion.—1 Com. 439, *Smith vs. Young*.

And a false assertion by a carrier that he had delivered the goods, does not amount to a conversion.—*Attersol vs. Briant*, 1 Com. 409.

And in every case where a demand and refusal is permitted to go to the jury as evidence of a conversion, it must be preceded by evidence that the goods are in defendant's possession, or what is equivalent, in the possession of his servant, with his knowledge or by his consent, either express or implied.—Buller's N. P. 44—Cited 3 Stark. Evidence, 1497, and also 2 Salkeld 441.

The other question raised by the counsel, is one which merits much consideration. For the question is one of a very nice character. The case shows that in regard to a harness and some old iron, which belonged to plaintiff, and were merely put into the defendants' hands for safe keeping, they absolutely refused to "give them up." Here was a demand and an unqualified refusal, and it is admitted the goods were in actual custody of defendants, and they might have surrendered them if they would. A demand and refusal under such circumstances unexplained, has always been held full evidence of a conversion. A demand and refusal is not in itself ever a conversion. Such an opinion is advanced in some of the old cases, (*Baldwin vs. Cole*, 6 Mod. 202) but has not been held to be law for many years.—1 T. R. 478, *et cetera*.—But the distinction is immaterial, for courts always charge the jury that such evidence unexplained, is satisfactory evidence of a conversion. But how may the evidence be obviated.

It may be shown that the refusal was qualified at the time, as in case of goods found, by saying he did not know whether the plaintiff were the owner; or in any other manner which manifests an intention not to put the goods to defendants use. The refusal in this case was not so qualified. But it was shown in this case that some days after the demand and refusal, and before suit was brought, the defendant being inquired of by a tax-collector for plaintiff's property, showed this, upon which the collector made distress, and



after several adjournments of the time of sale at plaintiff's requests, sold and applied the avails upon the bills of taxes against plaintiff. This being wholly subsequent to the refusal, could in no sense tend to qualify it. If the plaintiff had brought his suit immediately after the refusal, his right of action to recover the value of the property would have been complete.

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The subsequent application of the property even without the consent of the plaintiff would clearly go in mitigation of damages. But we are not prepared to say that it has any tendency to explain the refusal of the defendants. It is purely a second thought. And the court cannot perceive, how this distress and sale, even although the plaintiff did request the sale to be adjourned, has any tendency to show that plaintiff intended to waive his claim for damages against defendants. Had plaintiff accepted the goods from defendants, there would have been some reason to contend he accepted them in *satisfaction* of the claim for damages, and that this should be construed a *waiver* of all previous claim for damages. This would perhaps have been the most rational doctrine. But the cases all show that such evidence only goes in mitigation of damages, and does not defeat the right of recovery.—3 Stark. Evidence 1506—Buller's N. P. 46—4 N. H. Cases 338 *Baron vs. Davis*.

But how it could be contended that the plaintiff's request of the officer, not to sacrifice the property or for delay for any other purpose, shall be construed a *waiver* of all right of recovery, although until that time a perfect right of action existed, is more than can well be comprehended. This application of the property to plaintiff's use should go in *mitigation* of damages and can go no further.

If this distress could go to defeat the action, then also would a tender after the refusal to surrender the property. And some cases are referred to in support of this proposition. But they are cases which have not yet been published in America, being found in 1 Moore & Scott. This proposition does not seem to be founded upon any sufficient reason. A tender, as such, is not admitted in an action of tort, however reasonable such a doctrine might seem in many cases. After a right of action *in tort* has once accrued, it is not in the power of the delinquent party to exonerate himself from the liability, unless by the consent of the party aggrieved, until the matter is regularly adjudicated. Why in this case an exception should obtain, it is not easy to see. True a demand and refusal does not show a conversion *in fact*, but it is plenary evi-

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dence of the fact of a conversion having been committed and unexplained, is *equivalent* to a *conversion*. It is the same then as to the effect of a subsequent tender of amends, by restoring the chattel, whether he has *used*, *abused*, or refused to surrender the property on request. In the former case the property may be more injured; in the latter case the plaintiff may have suffered great loss in being deprived of the use. It is apparent, that a re-delivery of the property will not be a full satisfaction of the damage sustained in either case supposed. In reason, it ought to go only in mitigation of damages. It is well for the defendant that by this process of compulsory application of the property to plaintiffs' use, he can exonerate himself from a claim for damages to the full extent.

It was contended, that as the plaintiff's claim for damages must be merely nominal, the court will not grant a new trial where substantial justice has been done. Such is the rule in regard to new trials. And when the application is to the same court, who tried the case, or to a higher court, to set aside the verdict and for a new trial, and this addressed to the discretion of the court, as is common in New York and in the English practice, a *venire de novo* will never be awarded for any new circumstantial error or defect in the proceedings. But our trial in this court, *on exceptions*, is the same in all respects, except in form, as if it were on "writ of error." And we have only to pronounce whether there be error in the court below; if so, we have no discretion, and a new trial follows of course.

Judgment of county court reversed and new trial granted.

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### GEORGE A. ALLEN vs. ASA HALL.

When the commissioners of jail delivery certify that the creditor is duly notified, their certificate is conclusive.

Their decision, on a plea of abatement, cannot be examined in an action against the sheriff for an escape, or on the jail bond.

The effect of their decision is the same, when they certify the manner of notice, if they also adjudge and certify that the creditor was duly notified.

This was an action of debt upon jail bond, executed by the defendant and one Robert Beach, who was committed on an execution in favor of Horace Lovely. Several pleas were interposed by the defendant. But the only question which arose on the trial

of the case, was upon the plea of discharge from imprisonment under the poor debtor acts, which depended upon the validity of the following certificate :

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"STATE OF VERMONT, }  
Chittenden County, ss. }

"To George A. Allen, keeper of the jail in Burlington, in the County of Chittenden and State of Vermont,

"GREETING :

"Whereas, Robert Beach of Hinesburgh, in the county of Chittenden and state of Vermont, a prisoner in your custody, on an execution, at the suit of Horace Lovely of Burlington, in the county of Chittenden and state of Vermont, for the sum of 115 dollars and 19 cents damages and for the sum of 15 dollars and 94 cents, costs of suit, whereof execution remains to be done for \$31 43, signed by Nathan B. Haswell, clerk, and dated the 9th day of May, A. D. 1834, has this day taken the oath prescribed in an act entitled 'An act relating to levying executions and to poor debtors.' The said Lovely was notified by a copy having been left with William Weston of said Burlington, the attorney of record of said Lovely, twelve days before the time of hearing set in the citation, who showed to the commissioners the following facts, which were proved to the satisfaction of said commissioners, viz: that the said Lovely had resided in the town of Burlington, in the count of Chittenden, for some two years with his family—that in the spring of 1834, said Lovely went with his family to Hinesburgh, and stayed in his father-in-law's family, (Mr. Smedley) and remained there until two days previous to the service of the citation, when the said Lovely left Hinesburgh and went out of the state to seek a residence for himself and family, leaving his wife and children in Hinesburgh, in said Smedley's family where they continued to remain and still remain.

"The attorney pleaded the above facts in abatement of the petition, contending that the copy should have been left at the last and usual place of abode of the said Lovely, and not with the attorney.

"The commissioners decided that the said notice to the said Lovely was legal and sufficient and overruled the plea, and in our opinion the said Robert Beach ought to be discharged.

"Witness our hands, at Burlington, this 10th day of July, A. D. 1834.

(Signed) GEORGE P. MARSH, }  
I. P. RICHARDSON, } Commissioners."  
HENRY WHITNEY, }

The court having decided that the decision of the jail commissioners, in relation to the sufficiency of service as appears from the above certificate, was conclusive, directed a verdict for the defendant. Whereupon the plaintiff excepted, &c.

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*Mr. Weston for plaintiff.*—Although the defendant has pleaded seven pleas in bar to this action, the only question that ought to have been presented for the decision of the court, is the validity of the jail commissioners' certificate.

1. The certificate shows what the notice was and that Lovely was a resident of the county—that he was absent from the state at the time of the service of the citation, and that his family, (wife and children) at that time, resided in Hinesburgh, in Chittenden county; and we insist that the service of the citation upon the creditor's attorney of record, under such circumstances, is no notice to the creditor.—Stat. p. 221—S. 12 p. 237, no. 22—p. 241, no. 30.

2. The jail commissioners derive their whole authority from the statute, and if upon the face of their proceedings it appears that the creditor was not notified, the certificate must be void if notice was necessary.—*Dimick vs. Hubbell*, 1 Vt. Rep. 253—*Dean vs. Lowry*, 4 Vt. Rep. 481—*Raymond vs. Southerland*.—3 Vt. R. 505. And can the case be varied where they certify that no notice was given, or where they set forth a notice not authorized by statute? We think not.

*Messrs. Hyde and Peck for defendant.*

The opinion of the court was delivered by

WILLIAMS, CH. J.—The pleadings in this case have been extended altogether beyond what is either necessary or proper. By setting forth the certificates of discharge, executed by the jail commissioners, in a plea in bar, all the questions which have been made in this case would have been presented.

Robert Beach was committed to jail on an execution at the suit of Horace Lovely. He was discharged from his imprisonment by the commissioners of jail delivery, on taking the oath prescribed in the statute. The manner in which Mr. Lovely was notified of the application of Beach for the benefit of the statute, is set forth in the certificates given by the commissioners, as well as the fact of the appearance of the attorney of Mr. Lovely, and the determination of the commissioners, on the plea of abatement, filed by him. The questions which are here made, are as to the sufficiency of that notice.

It is settled by repeated adjudications, that the commissioners must decide upon the sufficiency and regularity of the notice given to the creditor, on the application of the debtor to be admitted to the oath for poor debtors. They are required to decide upon this

and their determination is to be stated in the certificates which they give. Their decision cannot be questioned in any other suit.

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If a plea in abatement can be interposed to a citation, it must necessarily be heard before, and adjudicated upon by the commissioners, and their decision thereon must be final and conclusive.

The commissioners have decided, that the citation to the creditor was properly served, by leaving a copy with his agent or attorney of record. The question was presented to them for their determination, by a plea in abatement, and if their view was erroneous or their decision incorrect, it cannot be reviewed in this or any other suit.

The only cases where the certificates of commissioners have been adjudged void and inoperative, are when no notice to the creditor has been given, although required by the statute. The commissioners are not constituted judges of the question, whether notice is or is not to be given; but when notice is attempted to be given, they are to determine on the sufficiency of the notice, and certify accordingly.

The only ground on which the plaintiff claims to recover in this case is, that no notice was given to the creditor in the execution. But he appeared by his attorney, Mr Weston, and filed a plea in abatement that the service of the citation was defective. When a party appears to a suit and files a plea in abatement, on which a judgment is rendered, overruling the plea, he cannot afterwards, either in that or any other suit, aver or allege that he had no notice of the suit. Neither of the judges, in the case of *Raymond vs. Southerland et al.* 3 Vt. R. 494, intimate an opinion, that the decision of the commissioners on a plea of abatement could be re-examined and set aside in a collateral suit.

The present is not a case where the commissioners have decided that "notice to a person other than a creditor is sufficient." Their decision is, that notice was given to the creditor by serving the citation on his attorney.

The propriety of the commissioners giving a certificate in the form adopted in this case, may well be doubted. It would be attended with great hazard, if the commissioners, who are to determine on the question of notice, may certify the facts proved before them, together with their decision thereon; and the debtor, his bail, or the sheriff are to incur the risk of their determination being a legitimate inference from the facts found.

In every point of view we consider that the certificate of the

CHITTENDEN, commissioners, that the creditor was duly notified, was conclusive, and there has been no breach of the condition of the jail bond. The judgment of the county court is therefore affirmed.

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### JOHN W. CUSHING vs. HENRY HALE.

When a person is committed to jail, and remains within the same, or within the limits, who is subject to have a guardian appointed over him, as a spend-thrift, under the 14th section of the statute in relation to settlement and providing for the poor, the select men and civil authority of the town where the jail is situate, may make the complaint for that purpose, if such person has no legal settlement in the state.

*Semb.* The select men and civil authority of any town where such person resides, may make such complaint.

If such complaint recites that it was made by a majority of the select men and civil authority, and the magistrates act thereon, it is *prima facie* evidence that it was made by such majority.

This was an action for money had and received for plaintiff's use. The defendant plead in abatement to which the plaintiff replied. The defendant demurred to the replication, which the court decided to be sufficient, and ordered the defendant to answer over. The defendant then plead non assumpsit with notice. Upon trial it appeared that the money received by the defendant for which this action was brought was pension money due the plaintiff as an invalid pensioner of the United States.

The defendant offered in evidence a copy of a record of the proceedings of the select men and civil authority of Chelsea and the doings thereon, showing that the defendant was appointed guardian of the plaintiff in 1827. To this evidence and to the admission of any evidence under the notice of the defendant, the plaintiff objected upon the ground that the same identical facts which the defendant had set forth in his said notice, had been pleaded in abatement and decided against him upon that plea.—The court overruled the objection and admitted the evidence.

The defendant also offered in evidence two accounts, purporting to be the accounts of said Hale as guardian of said Cushing, approved by the select men of Chelsea, and also parol evidence tending to prove, that the select men who signed the complaint against said Cushing and who approved the accounts of said guardian, acted, at the time when they signed the same, in that capacity, and were select men of said town of Chelsea. To this evidence the plaintiff objected, on the ground that the record of their appointment

was the only proper evidence. The court overruled this objection and admitted the evidence.

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The plaintiff also objected to the receipt of the copy of the proceedings whereby the defendant was appointed guardian of said Cushing, upon the ground that the defendant must prove otherwise than from the recital in said copy, that said appointment of said Hale guardian, was made at the instance of a majority of the select men and civil authority of the town of Chelsea. This objection the court also overruled.

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The plaintiff then offered in evidence, a copy of an execution in favor of Dano and Stearns against said Cushing and the officer's return thereon, and also the depositions of D. Azro A. Buck, L. Bacon, Annaniah Bohomon and Benjamin Grout, which tended to prove that Cushing, at the time of being put under guardianship, had no residence in Chelsea otherwise than as a prisoner in the jail limits—that for two years previous to his commitment to prison, and at the time of his commitment he was a resident of Norwich, in the county of Windsor.

It was admitted that Cushing had no legal settlement in the state of Vermont.

From all which evidence the plaintiff insisted that the town of Chelsea had no jurisdiction over said Cushing and that the proceedings of the select men and civil authority of Chelsea, and the appointment of said Hale guardian of said Cushing, were wholly void; thus the money received by said Hale as guardian, being a pension given by the government of the United States to the plaintiff, is not by the law of the United States subject to the control of such guardian or any person but the pensioner himself.

The court decided against the plaintiff upon the point above raised, and rendered judgment for the defendant to recover his cost; to which several decisions and judgment of said court the plaintiff excepted. Exceptions allowed and certified.

*Sawyer and Weston for plaintiff.*—The select and civil authority of Chelsea had no right, under the statute, to procure the plaintiff to be put under guardianship, and if the authority under which the defendant seized Cushing's pension money was void, then he is unquestionably responsible for it in this action.

It is too clear to admit of illustration, that if Cushing did *not* "belong" to Chelsea, then its select men and civil authority could make no complaint on which the two justices could legally issue a citation, or appoint guardians over him, and the whole proceedings

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were absolutely void. In determining the true construction of the statute, let it be remembered, that it is most harsh if not oppressive in its character; that it vests a summary and fearful power over the whole fortunes, comforts and reputation of a citizen, not in our high courts, but in a set of inferior magistrates, and that it ought to receive a strict construction.

1. We contend that the term "belongs," in the statute, means *legally settled*. It is used in exactly that sense, in section 5 of the poor act, p. 371.

2. The case states that Cushing had no other residence in Chelsea, than as a prisoner in jail; and in *Danville vs. Putney*, 6 Vt. Rep. 512, the court expressly decided, that prisoners, so situated, are *transient* persons within the meaning of the 11th section of the poor act. If Cushing was a *transient* person in Chelsea, did he "belong" there, in the sense of the statute or in any sense? It can make no difference that he had no legal settlement in the state, because, his support and maintenance devolved on the state and not upon Chelsea—(see no. 5, Sup. Act, Rev. Stat. p. 384)—and because, were it otherwise, the town only to which he "belonged," could interfere to place him under guardianship.

3. The whole tenor and spirit of the statute show, it appears to us, that the right of a town to place the spendthrift under guardianship, flows from the fact of his being legally settled there. It is intended simply as an indemnity against their ultimate liability to support him in sickness and poverty. There is not an expression intimating that moral restraint, the benefit of himself and family, &c. were any part of its object, except so far as those consequences resulted *incidentally*. It is town action, town custody, town security, from beginning to end. Nor will it do to say that, although the state was ultimately liable to support plaintiff, yet Chelsea *might* be subjected to some loss or trouble beyond the proportionate amount provided by the treasury. *De minimis non curat lex*. It would be a new idea, that every *transient* person might be seized, because he abode in a town for a week, and his property sequestrated, on the ground of a mere possibility of a trifling loss; much more so when his stay was owing to legal coercion. Cushing "belonged" to Chelsea, not as coming to reside there—not as subject to military duty or taxation there—not as a voter there—not as a corporator for whose support and maintenance Chelsea was responsible. He "belonged" there in no sense literal or technical, that gave Chelsea a right to sequester his property.



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4. The provision that the two justices might appoint a guardian, "if upon examination it shall appear that the person complained of, comes within the true description, intent and meaning of this act," (sec. 14) makes their acts conclusive only as to the improvidence and debauchery &c. of the person complained of. Obviously their adjudication cannot bind an individual not subject to the operation of the act.—3 Cranch 331, Wire and Withers—13 Johnson, *Suydam and Wyckoff vs. Keyes*. But the act is void for the reason given above.

5. It is said that inasmuch as the ward could *complain*, he is bound by the guardianship while it subsists. The answer is: 1. That the statute gives no appeal from the determination of the justices. 2. That he may complain of the *doings of the guardian*, (Prov. Sec. 15—p. 375, Rev. Stat.) or 3d: He may sue humbly for a certificate of reformation from the guardian interested to withhold it—or, 4th: He may apply to the county court for a restoration of the fragments of his property left. Now all these modes of relief presuppose the *right* to put him under guardianship, and could not be applied till the injury was inflicted; and hence a direct action against the defendant acting under a void authority, is Cushing's only remedy.

We contend that the pension of the plaintiff was exempted from the operation of the act under which the defendant was appointed guardian; and there was no other property of Cushing taken. By the act of Congress, passed April 10, 1806, no sale, transfer or mortgage, of the whole or any part of any pension to non-commissioned officers, &c. before the same becomes due, shall be valid, and whoever claiming the same under power of attorney, must make oath that such power of attorney, is not given by reason of any transfer of the same. By the act of April 28, 1808, the operation of that act is extended to commissioned officers, disabled *since* the revolutionary war.—See Ing. Dig. p. 522 & 523.

*Mr. Upham for defendant.*—The defendant resists the plaintiff's claim upon the ground that he was on the 26th of May, A. D. 1827, by two justices of the peace, within and for the county of Orange, appointed guardian to the said Cushing, according to the provisions of the 14th section of an act, entitled "An act defining what shall be deemed and adjudged a legal settlement, and for the support of the poor; for designating the duties and powers of overseers of the poor, and for the punishment of idle and disorderly persons," and that, what money he received, belonging

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to the plaintiff, he received as such guardian, and has paid it out for the support of the said Cushing and his family and for the payment of his just debts, and has settled his account as guardian to the said Cushing, with the select men of Chelsea.—Vide stat. 374 sec. 14, and 385 sec. 4.

The counsel for the plaintiff insists, that the defendant's appointment as guardian to Cushing, was void, because Cushing had no legal settlement in the town of Chelsea, but resided there as a poor debtor on the jail liberties. Cushing had no legal settlement in the state, as appears from the bill of exceptions. He resided in Chelsea and so did his children; and if he or his children, while residing there, became a public charge, Chelsea must bear it.

The justices, therefore, had jurisdiction of the case, their proceedings are regular on the face of them and were properly admitted in evidence in the court below.

Again, if Cushing was aggrieved at the doings of his guardian, he had a right to complain to the county court for relief in the premises.—Vide stat. 375 prov. to 15th sect.

If he thought himself entitled to a restoration of his property, or that his pension was not under the control of his guardian, he should have applied to the court under the proviso to the 16th section of the statute for relief.—Vide stat. 376.

This pension money was liable to the control of his guardian and was so decided to be by the supreme court in Orange county, in the case of *Kendrick vs. Dana*.

We further insist that the proceedings of the justices appointing the defendant guardian to the plaintiff, being regular on the face of them, should afford protection to the defendant until set aside by a court of competent jurisdiction. If the proceedings had been set aside upon the ground that the justices had no jurisdiction of the case, a court of chancery would enjoin this action, inasmuch as the defendant has paid out all the money he has received for the support of the said Cushing and his family and for the payment of his just debts. This action being in the nature of a bill in equity, ought not to be sustained against the defendant.

It is further insisted by the plaintiff, that having pleaded this matter in abatement, we were not at liberty to set it up as a defence under the general issue. This position cannot, we think, be sustained. The general rule is this: the court will not permit a defendant to plead at the same time in abatement and in bar, to the same matter.—1 Chit. Plea. 492.

If matter is improperly pleaded in abatement and overruled it may afterwards be pleaded in bar or set up as a defence under the general issue. It is true, that at the first term of the court after this action was commenced, the defendant pleaded in abatement that he was the legal guardian of Cushing, and as such guardian received the money, &c. Cushing replied to the plea and the defendant demurred specially to the replication. The court adjudged the replication to be sufficient, and the defendant filed his exceptions which were allowed and the propriety of the decision is before this court for revision.

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All that the defendant asks in this case is a decision in his favor, and it is of no consequence to him upon what ground it is made. We think, however, that the judgment of the county court, upon the trial of the merits of the cause, should be affirmed.

The opinion of the court was delivered by

WILLIAMS, CH. J.—This is an action for money had and received. The plaintiff is a pensioner. The defendant has received his pension money, amounting to over \$1000, and claims to have received it as guardian duly and legally appointed, according to the 14th section of the statute in relation to the settlement of the poor, and to have regularly accounted therefor. The question involved and to be decided is, was the defendant legally appointed guardian? If he was, it is immaterial to enquire whether he has properly accounted therefor. It is not found that the defendant has ever been discharged from his guardianship. The remedy for the plaintiff, if he has sustained any injury, provided the defendant is his guardian, must be under the 15th section of the statute before mentioned.

It appears that two justices of the peace, on the complaint of the select men and civil authority of the town of Chelsea, on the 26th of May, 1827, appointed or attempted to appoint, the defendant as guardian to the plaintiff. We have not the proceedings here; but it seems an objection was raised at the county court, because no evidence was offered that the complaint was made by a majority of the select men and civil authority of Chelsea, other than the recital contained in the complaint. It is, however, very certain, that if a complaint was made, purporting to be made by a majority of the select men and civil authority of the town, and the magistrates acted on that complaint, it must be deemed *prima facie* to be the complaint of a majority. The mere count-

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ing the number who constituted the authority may as well be done by one party as another; and when the magistrates assume to act on a complaint, purporting to be made by a majority of the authority, whoever contends that there was not a majority to authorize their action, must make that fact appear. It is also expressly stated in this case, that the plaintiff had no legal settlement in this state. The important question then presents itself, whether the magistrates had any jurisdiction, and this depends on the construction to be given to the 14th section of the statute before mentioned. To authorize this proceeding, the magistrates must have jurisdiction over the person. It is a proceeding which principally affects the person complained of, and unless he is subject to that jurisdiction; or in other words, unless he is such a person as is contemplated in the statute, and liable on that account to be placed under guardianship, it is clear that any attempt thus to control him must be ineffectual. The words of the statute are, "That if any person, by excessive drinking, gaming, idleness or debauchery of any kind, shall so spend, waste or lessen his or her estate, as thereby to expose him or herself, or his or her family, or any of them to want or suffering circumstances; or shall by thus spending, wasting or lessening his or her estate, endanger or expose the town to which he or she belongs, in the judgment of the select men and civil authority of such town or a major part thereof, to a charge and expense for the support and maintenance of him or her, or his or her family, or any of them; such select men and civil authority, or the major part of them, shall lodge a complaint with two justices of the peace, who may appoint a guardian or guardians to such person, who are to take him and family under their care, and take and dispose of his property, and manage the same in such a manner as will most conduce to the interest and advantage of such person, or his or her heirs." The object of this statute is two fold. First, for the benefit of the person and his family, and thereby, secondly, for the benefit of the town. If by excessive drinking, gaming, idleness or debauchery, any person is wasting his estate, he is considered as unfit to have the management or the control of himself and family, exposes himself and them to suffering, want and poverty, and the town to the charge and expense of their maintenance. So far as the first object was to be obtained, the proceeding is a regulation of police, to place the person who wantonly neglects himself and family, under the control of those who will do what he himself ought to do. To obtain this

object, the duty of making the complaint might as well have been required of any other tribunal, as of the select men and civil authority. It might have been made the duty of any informing officer to make the complaint. But as the town who would be under obligation to provide for him and family, in the event of his being unable to take care of himself, would necessarily have an interest to prevent the spendthrift from wasting his estate, it is made the duty of the select men and civil authority of the town who may be endangered or exposed, to make complaint and take the necessary steps to enforce the regulation of the statutes.

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There is nothing in the subject matter of the statute to require that this should be done by the overseers of the poor of the town where the person is legally settled. The town receives no direct benefit from the proceeding. They are only ultimately benefited by his being compelled, together with his family, to earn their subsistence, and by having his estate prudently and discreetly managed, instead of being squandered in riotous living.

The statute, however, makes use of the term, *the town to which he belongs*; and if this expression is to be considered as equivalent to, and synonymous with the expression "*legally settled*," then the objection is well taken to the proceedings had in this case.

But we find the term may as well imply an inhabitant of, or a resident in a town, as a person legally settled. The definition, then, must be gathered from the subject matter of the statute, as well as from the use made of the same expressions in other parts of the same statute.

To say that this power of appointing a guardian, can only be exercised on the complaint of the select men and civil authority of the town where a person is legally settled, would exclude from the operation of the statute, a number of persons who have no legal settlement in the state, and who certainly ought to be subject to its control, as much, or more than those who are legally settled in the state.

The person who dwells among us, who is ruining himself and family, and exposing them to wretchedness and misery, by the constant and habitual practice of those vices which are mentioned, and who must in a very short time be, with his family, relieved and supported by the town where he resides; who can look to no other town for remuneration, is, certainly, as proper a subject to be placed under guardianship, as though he had a legal settlement. The interest of community and of the town where he dwells, as imperiously demands it. The subject matter of this section would

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lead us rather to say that the expression, *the town where he belongs*, should be considered as *the town where he resides*, which, in the event of his poverty, would have to contribute to his relief. On reference to the 20th section of the statute, we find that the same term is made use of in this sense.

If any poor person, *belonging to any town*, shall apply for relief, &c. the overseers may make application to a justice of the peace, who, with the overseers, are to determine both as to the fact of his being in indigent circumstances, as well as the extent of the relief to be administered.

It was considered, in the case of *Washburn vs. Vernon*, Windham county, 1832, that this 20th section applies as well to those persons who had no settlement in the state, but who were poor, for whom the town was obliged to provide, as to those who had a legal settlement in the town; and that the term "*belonging*," in this section, does not intend that the person has a legal settlement. It appears, in the case now before us, that the plaintiff has no settlement in this state. With respect to such persons, we have no hesitation in saying, that they are proper subjects for the exercise of the power contemplated in the 14th section of the statute, and that it may and must be exercised on the complaint of the select men and civil authority of the town where such person resides. If such spendthrift has a legal settlement in the state, in a town different from the one where he resides, we are not called on to decide who must be the complainant. The construction which has been put on the 11th section of the statute in relation to persons confined in gaol, is in no way at variance with this construction, but rather confirmatory of it. It was a long time a matter of doubt, whether this 11th section extended to persons in gaol. The apparent inconsistency of considering a person as a transient person, who was actually confined within the walls of a prison, led many to doubt, whether persons confined in gaol should not apply for relief to the overseers of the poor of the town where they resided, and from which they were taken when carried to prison, rather than to those of the town where the gaol was situated. But it is now settled that the application must be made to the overseer of the poor of the town where the gaol is situated.

The town of Chelsea, therefore, was the town which was endangered or exposed to expense, if the plaintiff while in prison, and having no settlement in the state, became a subject of relief under the statute, rather than the town from which he was taken and which could not be *endangered* or *exposed*, in consequence of his

becoming a town charge while he remained in prison. If, therefore, the complaint may be made by the authority of the town, where such person resides, and must be made by the authority of the town who are exposed and endangered, it will follow that the civil authority, of the town where the gaol is situated, must make the complaint against all that class of persons, confined on and remaining within the limits of the gaol in such town, who have no settlement in the state. We are, therefore, fully satisfied that the magistrate had jurisdiction in this case, and that the defendant was legal guardian and must account for the property received, in some other way than in an action of assumpsit, at the suit of the person placed under his guardianship.

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This view of the case must, of course, dispose of the other branch of the argument in behalf of the plaintiff. For if the defendant has expended this pension money in payment of debts rather than in support of the pensioner and his family, and if that is a subject of which the plaintiff may complain, he must apply to the county court. But we cannot yield to the argument which has been advanced, that this pension was designed, exclusively, to be expended by the pensioner himself. It was designed, most undoubtedly, for the comfort and support of himself and family; and when he is incompetent to expend it for this purpose, whether from a defect of understanding, or from profligacy, it could never be supposed that the local authorities of the state might not place him under guardianship and do that for him which he could not do himself. The very fact that he is guardian, in this and similar cases, can possess himself of the money from the agent of the government, shows most conclusively, that although a transfer of a pension, by the pensioner himself, is not recognized; yet a transfer, by authority of law, to the person appointed to take care of him and his family, and expend his property with discretion, is recognized. If we were to assist the plaintiff to recover this money, yet we must first repeal our statute before we could say, that the guardian should not control and expend it in such a manner as the plaintiff ought to do. The want of any proviso in the act of congress, that the pension money shall not be paid to the guardian, when one is appointed; the fact that the money is so paid, make it sufficiently evident, that the government never contemplated that the pensioner should have the entire control of the money due to him, and expend it in a manner not conducing to his comfort and support or that of his family, and subject them to the various provisions made for the support of paupers. It surely could not

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relieve this pensioner, to have this money and expend it, and leave himself and family liable, under the 17th section of the same statute, to be bound out to labor, or employed in the work house.

We have not examined the account of the guardian, because, from the view already expressed, we think it is not to be done in this suit.

The result is, that judgment must be affirmed.

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JOHN DELAWARE vs. ALVAH B. STAUNTON.

In the action on book, a plea which admits the defendant to have been once accountable, though it goes in discharge, is bad.

Any plea in bar, which puts in issue facts to which the parties may testify, is bad.

Therefore, a plea of payment or settlement in bar, is bad.

Before auditors, parties are competent to testify to payment.

This was an action of book account, commenced at the March term of the county court, 1833.

The defendant prayedoyer of the plaintiff's account and plead, in bar, the following pleas.

1. That the defendant, heretofore, to wit, on the 10th day of January, A. D. 1833, at Jericho, aforesaid, paid and satisfied to said plaintiff, one dollar, in full satisfaction and discharge of said book account, and said plaintiff then and there accepted and received of said defendant said sum of one dollar in full payment, satisfaction and discharge of said book account.

2. That after the accruing of the account aforesaid, to wit, on the 10th day of January, 1833, at Jericho aforesaid, the plaintiff and defendant then and there settled and adjusted all demands and book accounts between them—and said book account was then and there, by the mutual consent and agreement of said plaintiff and defendant, settled, adjusted and paid; and said plaintiff then and there, after the accruing of said account by his receipt or memorandum or writing, signed by the said plaintiff, acknowledged that he had then and there received of said defendant one dollar, in full satisfaction and discharge of said book account.

3. That after the accruing of said account, to wit, on the 10th day of January, 1833, at Jericho aforesaid, said defendant fully accounted to and with said plaintiff, in relation to said book account, and there was then and there, on said accounting, in rela-



tion to said book accounts between said plaintiff and defendant, found due, from defendant to plaintiff, one dollar,—and defendant then and there, paid and satisfied to plaintiff, said sum of one dollar, in full satisfaction and discharge of said book account; and plaintiff then and there accepted and received of and from defendant, said sum of one dollar, in full payment, satisfaction and discharge of said book account.

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To these pleas the plaintiff demurred generally; whereupon the court adjudged them insufficient, and rendered judgment that the defendant ought to account. To this decision the defendant excepted.

At the March term of the court, the auditors to whom the cause was referred, made a special report as follows:

"The plaintiff exhibited as his account paper marked A. Defendant contended that on the 10th day of January, 1833, he settled with plaintiff and paid him the full amount of his account, and that plaintiff then executed and delivered to him a receipt in full, hereto annexed, which defendant insisted on as conclusive. Plaintiff's counsel offered to show by the oath of the plaintiff, that this receipt was obtained by fraud or mistake; to which defendant objected; but the auditor admitted the evidence and both parties testified, and from their evidence the auditor finds the following facts: That about the 20th December, 1832, the plaintiff drew and delivered to Butler and Peaslee, an order on the defendant for \$20, payable at sight; that Butler, of the firm of Butler and Peaslee, presented the order to Staunton, before the 10th of January, 1833, who said he would pay it, if on a settlement with Delaware, he should owe him that sum; that on the 10th of January, 1833, the parties attempted to settle, when it was agreed, that Staunton should accept and pay the twenty dollar order to Butler and Peaslee, and give Delaware an order on D. A. Smalley for the balance and therefore gave the accompanying order of eight dollars on said Smalley, which was exhibited to said Smalley, and he said he would accept it, and the plaintiff executed the receipt in full. Within an hour after the exchange of papers plaintiff went to defendant, alleging that there was a mistake in the receipt; that it should have been for eighteen dollars, and desired him to rectify the mistake or take back the order, which defendant refused, and the auditor finds it was not the intention of the plaintiff to settle the amount on the receipt of the order of \$8, but that his intention and expectation was, that it was to have been \$18."

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Auditor also finds that the order has not been paid by Smalley, and the same is herewith exhibited by the plaintiff, in order to be cancelled.

The auditor further finds, that Butler again presented the twenty dollar order to defendant, on the 10th February, 1833, and that defendant refused to pay it, and gave notice soon after to Delaware; that Butler and Peaslee sued Delaware for this \$20 of their account not paid by this order; that Delaware resisted on the ground that it was paid by the order, but in the end the parties agreed and Delaware paid them ten dollars, to be in full.— On this evidence the auditor considered and adjudged that plaintiff was not concluded by the receipt; that the account was still open and that plaintiff was entitled to recover.

To the acceptance of this report, the defendant made the following objections:

1. Because the auditor admitted the plaintiff by his *own* oath to avoid the settlement that was made and the receipt that was executed between the parties, on the 10th day of January, 1833, which was subsequent to the accruing of the plaintiff's account.

2. Because the auditor made the defendant chargeable for the order of \$20, drawn by the plaintiff upon defendant, in favor of Butler and Peaslee, after the defendant had given a conditional acceptance and that condition had become absolute.

The report was accepted by the county court and exceptions to the same filed by the defendant.

*D. A. Smalley for defendant*—The statute creating the action on book account, declares, that the "same proceedings shall be had therein as are had in the common action of account."—Rev. Stat. 142 sec. 2.

The same act, p. 141 sec. 1. declares, that "any defendant, in any action of account, may plead in defence any plea, (which being true, he she or they ought not to account) and it shall be tried by a jury."

Are not pleas in bar proper pleas, and pleaded in a proper manner? If they are, can the demurrer be sustained without repealing the statute.

2. The order drawn upon Staunton by Delaware, was conditionally accepted, or agreed to be accepted. And when the settlement was made and Staunton was brought in debt to Delaware for more than \$20, he was liable to Butler and Peaslee for the order, and nothing appears from the case that the liability has ever been discharged.

*Mr. Maeck for plaintiff*,—The defendant, in all his pleas in bar, sets forth the oyer of plaintiff's account and pleads payment, &c. of the account given in oyer, and of all accounts up to the 10th of January, 1833. His pleas were plead at the March term, 1833, and we contend they are all bad.

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1. Because they made the oyer material, and the plaintiff must either demur or take issue on the payment of the account given in oyer.

If the oyer is immaterial, the issue would be of course; and if the plaintiff replies over other account—as the oyer, if material, becomes a part of his own pleading—it would be a departure.

2. The auditor is bound to adjust the account up to the period of the audit; consequently the pleas should have negatived any account between the parties, arising after the 10th of January and the time of the plea pleaded.

3. If these pleas can be pleaded, the decision on the facts is withdrawn from the auditor and referred to the jury. Distinct issues may be formed then on every item of an account; for the court cannot say, that the jury may try one issue in fact and another in the same cause; and if the fact is tried by the jury and found against the party pleading it, he may still defend on the same ground before the auditor. The defendant also may have a jury decide on his defence against the plaintiff's account, which the plaintiff cannot have against the defendant's account, if he offsets it.

But again, if these pleas can be sustained, it deprives the party of the benefit of his oath; for it will not be contended that the court would permit him to testify before the jury. It is well settled law, that he is a witness in an action on book, to the truth of the matter set forth in these pleas.—*Stevens vs. Richards and Truesdell*, 2 Aiken 81—*Fay et al. vs. Green*, 2 Aiken 386—*Austin vs. Bary and Meigs*, 3 Vt. Rep. 59—*May and Wales vs. Corlew*, 4 Vt. Rep. 16—*Mattocks vs. Owen*, 5 Vt. Rep. 42—*Darling vs. Hall*, 5 Vt. Rep. 91—*Leach and Walker vs. Shepherd*, 5 Vt. Rep. 363—*Whiting vs. Corwin*, 5 Vt. Rep. 451—and in 6 Vt. Rep. 20, *Laughlin vs. Hill*, it was said by the court, that the only exception to the broad rule, that the party might testify to every fact, to the extent of any other witness, except in the case of a new promise.

As to the objections made on the auditor's report, the first is fully settled against the defendant by the foregoing authorities.

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The second is frivolous and unconscionable. The defendant never paid or accepted the order, as he was bound to do, and it was destroyed. His objection is, that plaintiff might, by reason of the laches of B. and P. have forced them to make it their own, which cannot avail him if they could.

The opinion of the court was delivered by

WILLIAMS, CH. J.—In this case, which is an action on book, the defendant plead three several pleas in bar, to which there was a general demurrer. The county court rendered judgment for the plaintiff, to which exceptions were taken. The pleas are evidently bad. They amount to payment and nothing more; and whether considered according to the rules applicable to the action of account at common law, or to our action on book, such pleas are not to be received in bar of the action, but in discharge of the account before auditors. As a general rule, any matter which admits the defendant to have been once accountable or chargeable, although it goes in discharge, must be plead before auditors, and not in bar. The distinction which was early made in this action, was, that the judges were judges of the action and not of the account, but the auditors were judges of the account. A release of the *action* was held to be a good plea in bar, but a payment to the plaintiff himself, or by order of the plaintiff, or that the plaintiff had acquitted the defendant of the sum demanded, which amounted only to payment, could only be taken advantage of before auditors.

But further, by the system established by the statute, and the decisions of the court thereon in relation to the action on book, these pleas could not be allowed. They put in issue facts to which the parties may testify. It has been repeatedly decided that both the parties are competent to testify in relation to payment. As these pleas would put the question of payment, settlement, &c. in issue before the court and jury, when the parties cannot be sworn and testify, instead of putting them in issue before auditors, where the parties are competent witnesses, they cannot be sustained.

Further, these pleas do not and cannot answer the whole demand of the plaintiff. The auditors are to adjust the accounts between the parties to the time of auditing, without reference to the commencement of the action. Hence, although a suit may be commenced on account, before the time of credit had expired, yet, if it had expired before the hearing, by the auditors, and the

sum due is not paid, the plaintiff is entitled to a judgment. These pleas do not profess to answer any claim of the plaintiff later than the 10th of January, 1833, although they were filed in court two months subsequent to that time. It is said, that the plea meets the whole account proferted by the plaintiff, in answer to the prayer of oyer made by the defendant. It may be answered, that the plea should meet the whole action, and not merely the bill of particulars. It may also further be answered, that by the decisions of the courts, as recognized by chief justice Skinner, in *Reed vs. Barlow*, 1 Aik. 145, and by judge Phelps, in *Loomis vs. Barrett*, 4 Vt. Rep. 450, a plaintiff is not bound by his account as proferted, on the plea of oyer, and the defendant may not assume that the account thus proferted, is the whole which will be presented and controverted before auditors. On this ground the pleas cannot be considered as defending the whole cause of action.—The judgment of the county court, therefore, that the pleas were insufficient, was correct.

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We have also noticed the objections which have been made to the judgment of the county court, in accepting the report of the auditors, and do not find them well founded. As to the first objection, it is sufficient to say, that it has been too often decided, that the parties are competent to testify as to the question of settlement or payment, to permit it now to be argued. The plaintiff was competent to testify in relation to a settlement. On the second objection, we can see no reason why the defendant should not be made chargeable for the whole account of the plaintiff. There is no foundation for the allegation, that the defendant can ever be made liable to Butler and Peaslee, on the order of twenty dollars, drawn by the plaintiff on the defendant, in December, 1832, after what has taken place between them and the plaintiff.

The judgment of the county court must be affirmed.

## FRANKLIN COUNTY,

JANUARY TERM, 1836.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*  
 " SAMUEL S. PHELPS, } *Assistant Justices.*  
 " ISAAC F. REDFIELD, }

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ST. ALBANS STEAM BOAT COMPANY *vs.* WM. H. WILKINS.

In all contracts for service, the performance of the entire term is a condition precedent to the right of recovery, and nothing short of an express stipulation to that effect, will enable the party to recover for part-performance.

If in a contract for service *by the year*, the undertaker would exonerate himself from service during any part of the term, on the ground of custom, he must show, that such is the general understanding of such contracts.

And unless he can show this or some other sufficient excuse, for such absence from the business of the employer, it is an abandonment of the undertaking, and he is not entitled to recover part pay unless he can show, that the employer consented to his return after the absence, and thus waived the forfeiture.

This was an action of assumpsit for money had and received, commenced in the county court. Plea, non-assumpsit and trial by jury.

It appeared in evidence, that on the 2d day of March, 1830, the defendant was appointed by the plaintiffs captain of their steam-boat McDonough, and they sought to recover monies received by him as captain under said appointment. From the course of the trial, the attention of the court and jury became confined to a single subject of dispute, viz, a sum of two hundred and forty dollars, claimed and retained by defendant for his services.

The plaintiff introduced evidence tending to prove that they hired the defendant by the month, at the rate of twenty dollars a month; that his services were continued for about the period of nine months, and that afterwards (in the winter season of 1830 and 1831) he took a journey to Portsmouth, N. H., to Montreal

and Burlington, and that for most of said time, he did little or nothing in the business of the plaintiffs.

The defendant introduced evidence tending to prove, that he was employed for a year, at two hundred and forty dollars; that immediately upon his appointment, he received the keys of the boat and devoted himself to the arrangements preparatory to the business of navigation; that when the lake opened, he began his regular trips and continued them through the season of navigation; that he afterward kept the keys and had oversight and care of the boat through the winter of 1830 and 1831, and was occupied a considerable portion of said time in settling with customers, collecting in dues and arranging and closing the concerns of said business, and that his successor was appointed in March, 1831, to whom he then delivered the keys of said boat.

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It appeared that the journey to Portsmouth was made in February, 1831; that it was upon defendant's own business, and that he was absent about two weeks; and whether the journey to Montreal or Burlington, had any connexion with the business of the plaintiffs, did not distinctly appear.

The court charged the jury, that if they should find that the defendant was employed by the month and that the time of his actual services was less than twelve months, they should return a verdict in favor of the plaintiffs, for such part of the \$240, as the defendant's actual service, at the rate of \$20 a month did not cover, with interest. But if they should find he was employed for a year, at an agreed salary of \$240, they should return a verdict for defendant.

Verdict and judgment for defendant, and to the charge of the court plaintiffs excepted.

*Beardsley and Stevens for plaintiffs.*

*Smalley and Adams for defendant.*

The opinion of the court was delivered by

REDFIELD, J.—The defendant having retained his full year's pay, the plaintiffs claim to recover all or a portion of the sum retained, in consequence of the defendant not having performed the contract on his part.

The court below charged the jury, that the plaintiffs might recover of the defendant, for so much money as he had retained above his monthly stipend, for the time he was in plaintiffs' employ, provided they found the fact that the hiring was by the month.—But they are instructed, that if the hiring was by the year, at a

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stated salary of \$240, and defendant had retained his full salary and been absent from plaintiffs' employ any portion of the year, still the plaintiffs cannot recover. This part of the charge we think not correct in the general terms in which it is expressed in the bill of exceptions. The plaintiffs' right to recover depends, of course, upon the defendant's right to retain full pay for a year. The defendant's right to retain full pay does not depend upon the fact, whether the hiring was by the month or by the year. In either case, if the full term of one year's service had been performed, the plaintiff could not recover; and if the full term of one year had not been performed, the plaintiffs must recover either for the deficiency or the entire sum retained, for an abandonment of the contract by the defendant.

The plaintiffs gave testimony tending to show that the defendant was, during the winter season, absent from their employ some three months. They are, of course, entitled to such a charge as that state of facts would require. If this was a voluntary abandonment of the contract and a wilful desertion of plaintiffs' business, the defendant would not be entitled to any compensation for his former service and the plaintiffs should recover the entire sum retained. This results from one of the most obvious principles of the law of contracts. In all contracts for service, which are entire, full performance, on the part of the undertaker, is a condition precedent to any claim for compensation, and nothing short of such a provision in the contract, either express or implied, will enable him to recover for part performance.—1 Swift's Dig. 682, 683—*Cutter vs. Powell*, 6 T. R. 321—*Faxon vs. Mansfield*, 2 Mass. Rep. 147—*Jennings vs. Camp*, 13 Johns. 94.

The testimony clearly tended to show such an abandonment of the contract on the part of the defendant, and the jury should have been instructed how far this would affect the verdict, and also how the defendant might obviate the effect of such testimony. He might show that according to the custom of the country, in such contracts, he was entitled to the winter months, when of course, navigation is closed, to recreate and recruit. We know of no such custom, and have no doubt such is not the understanding in contracts of this class. The master of a steam boat of this character and class, is doubtless expected to collect the dues of the company and superintend the necessary repairs of the boat and machinery, during the winter season. And if he wilfully neglects to perform his duty here, it is an abandonment of the contract, as much as if he had deserted the boat in the season of navigation.



The defendant might show plaintiffs' consent to his absence, or what is most rational to presume, he might show that they consented to his continuing in their employ after his return from his temporary absence and thus avoid the forfeiture, which they were entitled to have insisted upon. But these facts should have been left to the jury. And unless the defendant could satisfy the jury either that he was not absent from plaintiffs' reasonable and necessary employ, or that they consented to the absence, the plaintiffs should have recovered the entire sum retained. But if after such absence, they consented to waive the forfeiture, then plaintiffs should recover all monies retained by defendant, for the time he was absent, unless indeed defendant could show, that by the terms of his contract or the custom of the country in relation to such contracts, he was entitled to such absence, without affecting his wages.

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For this error in the charge to the jury, judgment is reversed and a new trial granted.

## STATE vs. MAZELDA KEYES.

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The seventh article of amendment to the United States Constitution, which provides, that in the trial of capital and other infamous offences, the accused shall be entitled to trial upon indictment, has reference to offences cognizable only before the United States courts.

The persuading a witness not to attend a public prosecution on the part of the state, although not infamous, is an indictable offence, even where such witness had not been regularly served with a subpoena, but was known to be a material witness and to be relied upon by the public prosecutor.

The attempt to commit such offence, evidenced by distinct and unequivocal acts, is indictable, whether it succeed or not.

So the soliciting any one to commit such offence is, it seems, itself indictable.

There were two informations against the same respondent, charging nearly the same offence, filed in the court below by the states attorney of this county. The first count in the first information, charges in substance, that the grand jury had preferred a bill of indictment against one Joshua H. Howe, which was pending and tried at the time of filing the information, and that John Keezer was a material witness on the part of the state and about to be summoned to attend the trial as a witness, and that the respondent knowing these facts and that Howe was about to be arrested and

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held for trial, "did endeavor to persuade and induce the said John Keezer to abscond and refrain from appearing before the court aforesaid at any time during the term, to testify the truth and give evidence before the said court on the trial aforesaid, with intent to obstruct and impede the due course of justice."

The second count charges, that said Howe had been by a justice of peace, on due process, recognized for his appearance at the county court in this county, for trial on a charge of felony; that Keezer was a material witness on the examination before the justice, and had there been improved by the state and recognized by the justice, for his appearance before the county court aforesaid, to testify in the case; that these recognizances were taken and made returnable and returned to the April term of the court, 1834; that at the September term, 1834, the grand jury presented a bill against Howe for the offence for which he had become recognized, and that that bill of indictment was pending in court at the April term, 1835, and that Keezer was a material witness on the trial: that his recognizance was in full force, and Howe about to be tried and afterwards tried; that these facts being well known to Keyes, he "endeavored to dissuade, hinder and prevent the said Keezer from attending court," &c., as set forth in the other count.

The second information alleges that Howe was in custody and about to be put upon his trial in the county court for felony, on an indictment duly presented by the grand jury; that Royce K. Beeman was a material witness, and that the state had caused a subpoena in due form to be issued, requiring his attendance on a certain day named in the writ, before the court to testify on the trial of the indictment; that Keyes knowing the premises did "endeavor to dissuade, hinder and prevent," &c., as in the other information, he also knowing that this subpoena was then about to be served upon the witness Beeman. The second count does not materially vary the case.

The respondent first moved, before pleading to these informations, that they be quashed and dismissed for want of any authority in the state's attorney to file them. This motion being overruled, he went to trial on the general issue, and after verdict of guilty, moved the court to arrest judgment for the insufficiency of the information. This motion also was overruled and exceptions were allowed, and both questions came here for revision.

*Henry Adams, state's attorney.*—There is no uncertainty in the information as to the time when and where the offence was

committed, or in the description of the person or of the offence itself. But the respondent insists that there is no crime charged in the information.

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By the common law all offences below the degree of felony, are denominated misdemeanors, and were, in general, punished by fine and imprisonment, and might be prosecuted by information filed, *ex officio*, by the attorney general.

To endeavor to dissuade a witness from giving evidence, or to advise a prisoner to escape or stand mute, are all impediments to the due course of justice, and are by the common law considered as high misdemeanors. The mere attempt to stifle evidence is a crime, though the attempt should not succeed.—4 B. C. 126—2 Chitty C. L. 116, 236—6 East. 466—2 Strange 904.

The second count charges the respondent with attempting to prevent the service of the subpoena of the court upon the witness Beeman, by persuading him to leave the state. If Beeman, knowing of the issuing of the subpoena, had left the state to prevent the service, he would have been guilty of a misdemeanor, as any obstruction to the execution of lawful process, is a crime.—4 B. C. 129.

The witness, Keezer, was bound by his recognizance to appear at court, and if he had neglected to appear, he would have been guilty of a contempt. And the attempt to commit a crime or to solicit another to commit a crime, is criminal.

But it is said, that by the constitution of the United States, all infamous crimes must be prosecuted by indictment, and that the crime charged against the respondent, is included in that class of offences denominated *crimen falsi*.

Article 7th of amendment to the constitution, relates to offences against the laws of the United States and not to crimes against the laws of the several states. Without this article of amendment, all offences, even treason, might be prosecuted by information, as congress had the power, before the amendment, to prescribe the manner of prosecuting offences against the laws of the Union. This article was evidently intended as an amendment to the third article of the constitution, as first adopted.—See sec. 2 and 3 of that article. And the 8th article of amendment points out the district from whence the jury shall be taken and in which the offender shall be tried, which was omitted in the original constitution. But the states must possess the power of prescribing the form and mode of prosecuting offences against their own laws, unless this power is expressly prohibited to the states by the constitution of

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the United States, which is not pretended.—See 12th article of amendment. And it is believed that the states have always exercised this power since the revolution.

But it is denied that attempting to dissuade a witness from giving evidence, is an infamous crime.

By the common law, infamous persons were not allowed to testify, and the reasons assigned were, that infamous persons were not permitted to serve as jurors, and therefore were not allowed to give evidence to inform that jury with whom they were too scandalous to associate. And such crimes and such only as disqualified a person from acting as a juror, were deemed infamous by the common law; these were treason, felony, perjury, conspiracy, præmunire, forgery, being attainted of false verdict and proving recreant in the trial by battle.—3 B. C. 363, 369, 370.

Formerly the infamy of the punishment and not the nature of the crime, was the test of competency.

But it is said that recently the English courts have become more enlightened and have adopted better rules upon this subject, and that now all crimes are deemed infamous which the court shall happen to decide to be inconsistent with the common principles of honesty or humanity. This rule is as uncertain as the views and feelings of mankind concerning the principles of honesty are various and changeable, and there is nothing about which mankind have differed more widely in all ages. One court might determine that profane swearing or Sabbath breaking is inconsistent with the principles of common honesty; another that a petty assault was inconsistent with the common principles of humanity.

This doctrine may be consistent with the principles of the English oligarchy, but its adoption here will produce much inconvenience and difficulty. The infamy or disability should always be a part of the punishment for certain crimes, and considered in this light, it would seem to belong to the legislature to decide what crimes should be considered infamous.

*Smith and Beardsley for respondent.*—1. We insist that the state's attorney has no power, *ex officio*, to file an information for the offence charged in the present case, and that the respondent cannot be held to trial thereon.

The statute, page 557, in enumerating the duties of a state's attorney, declares that for all matters or causes cognizable by the supreme or county court, the state's attorney shall have power "to file information, *ex officio*, in said court in matters therefor."

We concede that, by the common law, this power existed, and that if we have adopted that part of the common law which gives this power, it may with propriety be exercised here.

By the act passed in 1797, Comp. stat. 57, it is enacted, "that so much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution or to any act of the legislature, &c., be and hereby is adopted law in this state."

Now if this common law power is repugnant to the constitution of this state or the United States, it has never been adopted here and no such power now exists.

By the 6th article of the constitution of the United States it is declared, "that no person shall be held to answer for a capital or otherwise infamous offence, unless on a presentment or indictment of a grand jury."

By the 6th article of the same constitution, it is declared that this constitution and the laws of the United States, which shall be made in pursuance thereof, &c., shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

Whether this common law power now claimed to exist in this state, is repugnant to the constitution of the United States, depends solely upon the question, whether the offence charged in the indictment is of an infamous character, and whether legal infamy would attach upon a conviction.

If so, it is the very case for which the constitution has declared that no person shall be held to answer, "unless on a presentment or indictment of a grand jury."

This then leads to the only remaining consideration, namely, whether the offence charged be of such a character as would, upon conviction, render the respondent legally infamous. [The counsel here cited 2 Stark. Ev. 715—1 Chit. Crim. Law 489—3 Stark. R. 21—Phil. Ev. 22.

In order to render a person infamous on conviction for an offence it is not necessary that he should be subjected to an infamous and disgraceful punishment.

It is not the punishment but the nature of the offence which works the infamy.—Willis' R. 665—Phil. 20, 23—2 Stark. 714.

We apprehend, in all convictions in this state for crimes or misdemeanors punishable by imprisonment in the state prison, no doubt can exist that on conviction, infamy attaches.

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Now if it is the nature of the offence and not the punishment which induces infamy, it would seem to result, that those misdemeanors or crimes against society not provided for by statute but involving equal moral turpitude with those which are provided for by statute, and are made punishable by imprisonment, should be regarded as equally infamous.—1 Blac. R. 401—1 Leach 442—2 Chit. crim law 910.

2. It is insisted that the informations are insufficient. 1. Because they do not recite the writ of subpœna. This is always done as appears by all the forms and is necessary, that the court may know whether they are such as would bind the witness to attend and give evidence.—3 Chit. Crim. Law 116—2 Swifts Dig. 724. 2. It does not appear that either Beeman or Keeser were served with any subpœna, or that they were under any obligation, in obedience to any process of the court, to attend as witnesses, nor that they had any notice that the government wanted them as witnesses or intended to summon them. How then could the due course of justice be obstructed by any thing which the respondent could do.

3. Again, the ground work of the information is, that the defendant knew that the witness was about to be served with a subpœna, and the very gist of the offence is made to depend upon this knowledge.

Now how can it be said that the respondent knew that the witnesses were about to be summoned. It is utterly impossible that he should know any such thing. The averment of the fact of knowledge is, therefore, ridiculous and absurd, wholly destitute of substantial meaning.

4. The informations do not allege that the respondent succeeded in his attempt upon the witnesses.

In *Commonwealth vs. Bangs*, 9 Mass. Rep. 387, it was held that an indictment for administering a potion with intent to procure an abortion, must contain an allegation that an abortion ensued.

The opinion of the court was delivered by

REDFIELD, J.—The first question, in this case, arises upon the decision of the county court in overruling the motion to quash. That motion was made upon the ground, as we infer from the argument here, that this respondent being charged with an infamous crime, was entitled to insist upon a trial upon *indictment*. In support of this position the counsel rely mainly upon the seventh of the articles proposed and adopted in amendment of the constitu-

tion of the United States, which is in these words: "No person shall be held to answer for a capital or otherwise *infamous* crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger."

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As these amendments were professedly proposed and adopted with the expectation that they would define, limit and explain the provisions of the constitution, as originally reported by the convention, it is but reasonable that the amendments should be construed with a reference to the constitution. There can be no doubt this 7th article of amendment was adopted with reference to the 3d article and 2d section of the constitution. This section provides for a national judiciary, but no where requires that one accused of crime shall be entitled to require a bill of indictment to be found by a grand jury, before submitting to trial for the alleged offence. The only limitation, as to the mode of trial, found in the constitution, is, that the accused shall be entitled to trial by jury, (traverse jury of course) and that the trial shall be had within the state where the offence was committed, if committed within the limits of any state, and if not, then at such place as congress may by law have directed.

This 7th article of amendment provides, that in all capital or otherwise infamous crimes, the accused shall be entitled to the farther safe guard of liberty or life or character, afforded by a grand jury. The 8th article of these amendments states further limits, and restricts the mode of trial for crimes, by providing that the trial shall always be by a jury of the district where the offence is committed, which district shall have been previously defined by law. It could not well be doubted, that the provisions in the constitution, as first reported and the amendments, all have reference solely to trials in the courts of the United States. The phraseology clearly indicates this. In the first provision, trial by impeachment is excepted from the cases required to be tried by jury. This most clearly points to those trials which the constitution provides shall be had before the senate, on the motion and information of the house of representatives. In the article of amendment alluded to and which is relied upon in this case, offences committed in the land and naval service are excepted. The phraseology adopted in both cases, clearly indicates, that the provision has reference only to proceedings in the tribunals of the United States. The same reasoning and conclusion has been adopted by this court in reference to that article of amendment of

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the United States constitution which provides for trial by jury in civil actions—*Huntington vs. Spooner's trustee*, 5 Vt. Rep. 189. And we see no good reason why the same decision should not be now adhered to. The language of the 12th article of amendment thoroughly fortifies this construction. It provides that powers not delegated to the United States shall belong to and be exercised by the states. And although it be true that some of the provisions of the constitution of the United States are intended to be applied as well to the states as to the United States, such is not the fact in regard to its principal provisions. And we cannot presume that, but the contrary, to be the case, when the language of the instrument is general or equivocal.

It might be added as a further reason why we should not be inclined to adopt the view presented by respondent's counsel, and consider this article of the United States constitution as extending to trials in the state courts, that the contemporaneous construction and subsequent practice has, in reference to this subject, been wholly at variance with any such determination. Petty larceny, which is now very generally admitted to be an infamous offence, is in all our cities tried before the police courts, where it is well known no grand jury attend. The same is true of trials for petit larceny in this state and many of the other states, before single magistrates. And it has never been doubted that these convictions, upon information, were regular and valid. This consideration alone is entitled to great weight, as has been repeatedly held, both by the state and United States courts.

But even if we could adopt this view of the case, we are not prepared to say that the offence attempted to be charged in this information, is in its character infamous. The old notion that infamy depended upon the nature of the punishment, is long since abandoned. But we get nothing in its stead, which is, on the whole, much more satisfactory. We find the books filled with general definitions in abstract terms, which no man can pretend clearly to comprehend. Treason and felony, as at common law, are terms sufficiently intelligible, but the term *crimen falsi* is one of most indefinite extension, and when Russell extends it to every *falsehood*, which affects the public administration of justice, it is certainly leaving so important a consequence to depend upon a very loose and unsatisfactory condition. Legal infamy, as a part of the punishment of crime, is by far the severest portion of the punishment, in most cases of conviction of an infamous offence. It is important then, that the number of infamous crimes, which



on conviction shall induce legal infamy, should not be multiplied by *construction*. Those which are held to be infamous, as treason, felony, forgery, and perjury and bribery, should be clearly defined and well known. Some of the English decisions of late seem to have gone great lengths. The case of *Bushell vs. Barrett*, 21 Com. Law Rep. 483, expressly decides, that inducing one to absent himself from attending as a witness, in a question depending before justices in relation to offences against the revenue laws, was an infamous offence. This is put upon the ground of its being an offence tending to hinder the due course of public justice. An attempt even to induce a witness by threats or promises or any other means to disregard his obligation to attend as a witness upon the trial of a public prosecution, when the security of the public quiet and the purity of the fountains of public justice may be hazarded, is undoubtedly a high-handed offence, and as such should be severely punished. But when it is recollected, that in the heat of zeal to save a friend, whom they may believe to be more innocent than the testimony would seem to admit, men will sometimes be induced to go great lengths, and sometimes without much consideration, it is not perhaps best, that every *attempt* to induce a witness, under such circumstances, to avoid being compelled to attend even a public trial for felony, should be declared infamous. The decisions here have never as yet gone so far, and we should certainly hesitate in following the recent English authorities.

Upon both grounds then, we think the motion to quash should have been overruled.

But the respondent further moved the court in arrest of judgment for the insufficiency of the information. It is said, there having been no subpoena served upon the person, he cannot be considered in the light of a witness. But it will be difficult to say, just when the person will become so far a witness that it will be an offence to hinder him from giving his attendance upon the court. The essence of the offence is obstructing the due course of justice. This has always been held indictable, as a misdemeanor, at common law. Whether the witness had been served with a subpoena or not, cannot be esteemed very material. The effect of the act and intent of the offender is the same, whether the witness has been or is about to be served with a subpoena, or is about to attend in obedience to a voluntary promise. Any attempt, in either case, to hinder his attendance, is equally criminal and equally merits punishment. But in the case of the second count,

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this question does not properly arise. It is there alleged that the witness had been recognized for his appearance at a former term as a witness in this case. It has been decided by the court, that such a recognizance, though not so expressed, imposes upon the connusee, whether respondent or witness, the obligation to attend from term to term, until the case is determined. It is said at bar, that the bonds of Howe had been estreated, and thus Keezer exhonored from the obligation of his recognizance. This question cannot arise on a motion in arrest, or if it could, the indictment being good, the motion in arrest cannot prevail. For in criminal proceedings on motion in arrest, if one count in the bill or information be good, it is sufficient, although the contrary rule prevails in civil suits. And in any view of the case, the offence was complete. The witness having once been improved before the justice and recognized for his appearance to testify on the final trial, cannot be presumed to be in doubt, whether his testimony would be required on the final trial. Knowing this, it would be equally criminal in him corruptly to absent himself from the state or keep secreted, or in any other way avoid being summoned as a witness, whether his recognizance was or was not still in force. The question here is not whether the witness has been guilty of a contempt in disobeying the process of the court, but whether there has been a corrupt attempt to obstruct the due course of public justice by "*spiriting*" away or preventing the attendance of a witness. If the person induced to absent himself, knew of his being a witness and was induced to absent himself, the offence was complete in him. If the respondent knew of his being a witness and about to be compelled in due course of law to attend the trial, and endeavored to dissuade and hinder him therefrom, in the language of the indictment, his offence is complete. In this case, knowledge is carried home to both. It will not do, for a moment, to admit that the respondent might anticipate the officers of justice, and secrete, bribe or intimidate the state witnesses from attending the trial of public prosecutions, and not be liable for any act done, until a subpoena had been legally served upon the witness. This view will leave untouched the most corrupting field for offences of this character. It is further argued that the information is insufficient, because it contains no allegation that the offence was consummated, but only an *attempt* to hinder the witness from attending the trial. This question was formerly much discussed in Westminster Hall, but is now well settled.

The case above cited from C. L. R. (*Bushell vs. Barrett*) shows that a conspiracy to bribe a witness, to induce him not to give his attendance upon court, is held not only a high misdemeanor, but an infamous offence. And the doing of any act tending to obstruct the due course of public justice, has always been held indictable as a misdemeanor at common law. Bribing, intimidating or persuading a witness not to testify, or not to attend court, are each among the readiest and the most corrupting of this class of misdemeanors. The mere intent to commit a misdemeanor, or even a felony, until evidenced by some act, is not indictable, for a very sufficient reason, that human tribunals cannot take any just cognizance of human thoughts or intentions, except so far as they are expressed in their actions; and except in times of flagrant misrule and tyranny, this has never been attempted. But it is well settled at common law, that an attempt or endeavor to commit a felony or misdemeanor, is punishable itself, as a substantive misdemeanor. An attempt to bribe the first Lord of the treasury, to procure the reversion of the office of clerk of the supreme court of Jamaica, was in Lord Mansfield's time held clearly indictable.—*Box vs. Vaughn*, 4 Burr 2494 See also Plympton's cases, 28, Ray. 1377, and 1 Russell on Crimes 45, 46. It is equally well settled, that an endeavor to induce another to commit a felony or misdemeanor, is indictable as a common law offence.—*Rex vs. Philips*, 6 East. 464.

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The soliciting another to embezzle his master's money, was held clearly indictable.—*Rex vs. Higgins*, 2 East. 5—See also the cases there cited. In reason, a criminal intent and an act in furtherance of the intent, whether success follow or not, is deserving of the same degree of punishment, almost as if the principal offence had been consummated. Assaults with intent to murder or to commit rape, are by statute punished with great severity, as substantive offences. And we feel no hesitation in saying, that the attempt to commit an offence or the soliciting another to commit an offence, should (with few exceptions not necessary to be enumerated here, resting upon peculiar grounds) be held indictable, as misdemeanors at common law. This disposes of all the objections urged against the indictment.

The respondent not being in court to receive sentence, the bonds, on motion of the state's attorney, estreated.

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FAIRFIELD vs. THOMAS HALL.

A deputy sheriff cannot serve a writ in favor of a town of which he is a rated inhabitant.

This was an action of ejectment brought to the county court, where the defendant pleaded in abatement, for that the writ was served by J. Bradley, deputy sheriff, who was a rated inhabitant of the town of Fairfield. To which the plaintiff demurred. The county court rendered judgment that the writ abate, to which the plaintiff excepted, and the cause passed to this court for revision.

*Smalley and Adams for plaintiff.*—The office of sheriff is one and indivisible, and though he may act by deputy, yet the acts of the deputy are, in contemplation of law, the acts of the sheriff.—Walson on Office of Sheriff 23, 24—L. L. No. 20, 23, 24.

This principle was recognized in this court, in the case of *Holmes vs. Essex*, 6 Vt. Rep. 47, in which the court decided that the deputy could not serve a writ on the town in which the sheriff was a rated inhabitant.

This case must have proceeded upon the principle, that the service of the writ by the deputy, was the act of the sheriff.

In the case before the court, it is not pretended that the sheriff was an inhabitant of Fairfield, but that the deputy who served the writ, was.

If he was so, this cannot effect the service, if it is to be deemed the act of the sheriff. It cannot, in contemplation of law, be deemed the act of both sheriff and deputy, and if not this plea cannot be sustained without overturning the case of *Holmes vs. Essex*.

*A. and A. O. Aldis for defendants.*—The plea of abatement was sufficient.

1. The deputy sheriff was interested, being a *rated inhabitant* of Fairfield, and being interested, he could not serve the writ. The statute expressly prohibits sheriffs and constables from serving writs when *interested*, and the deputy sheriffs can have no greater power than the sheriff.—2 Stat. p. 64—6 Vt. Rep. 47, *Holmes vs. Essex*.

2. The general term "sheriff," by fair construction, includes the deputy sheriff, when the latter is not named.

3. The reason of the law which prohibits sheriffs, when interested, from serving writs, applies equally to deputy sheriffs.

4. The decision asked for by the plaintiff would establish principles inconsistent with the established rules of law. For instance; if the sheriff be a party, the deputy sheriff being his *agent*, cannot serve the writ; but when the agent becomes the principal, and instead of an indirect, has a direct interest, then he may act, would be the language of this new principle.

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5. Independent of our statute, by common law, the sheriff, "in case of partiality," was prohibited from serving writs.—Bac. Abr. M. 1 "Sheriff," p. 450—Cro. Car. 416, *Done vs. Smither*—1 Wm. Bla. 506—1 Bla. Comm. 349 or 266. The same decisions have been made in Massachusetts.—11 Mass. Rep. 181, *Gage vs. Graffman*—14 Mass. Rep. 216, *Brewer vs. New Gloucester*.

The opinion of the court was delivered by

COLLAMER, J.—It was decided in the case of *Weston vs. Coulston*, (Wm. Bla.) that a sheriff could not serve a writ in any case in which he was so far interested that he could not empanel a jury. It is obvious, from our whole statutes, that it was clearly intended that all writs should be served by indifferent, that is, *disinterested persons*. Where the sheriff is *interested*, the writ is to be directed to the bailiff, and where a deputation is permitted, it is required to be that of an indifferent person. The only remaining question is, was the officer, who served this writ, *interested*? In the case of *Holmes vs. Essex*, it was holden, and we think correctly, that every rated inhabitant of a town is interested in the event of the suits to which such town is a party, and that the sheriff cannot, by himself or deputy, serve a writ in a suit to which his town is a party. If the sheriff cannot serve a writ to which his town is a party, clearly his deputy cannot do more than the sheriff himself, and therefore cannot serve at the suit of his town. Writs must be served by disinterested officers, and to consider this service as the act of the sheriff only, and thus loose sight of the deputy, would involve the absurdity of permitting a deputy sheriff to serve writs in his own favor, or upon himself, by calling such service the act of the sheriff.

Judgment affirmed.

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LUCY GAFFERY *vs.* ALVIN AUSTIN.

A married woman cannot sustain a prosecution under the statute relating to "bastards and bastardy," for the purpose of compelling the father of a child, begotten and born during the coverture, to contribute to its support, even by showing total want of access of the husband of such woman.  
Such case is one not provided for by the statute.

This is a prosecution under the statute "relating to bastards and bastardy." The defendant moved to quash the proceedings on the ground that the complainant was a married woman, both at the time of the conception and of exhibiting her complaint. The plaintiff replied "want of access" of the husband, to which there was a general demurrer and joinder, and the court below quashed the proceedings.

*Mr. Stevens for defendant.*—The defendant contends that the statute, upon which this prosecution is founded, does not authorize a justice of the peace to issue a warrant on the complaint of a married woman.—Statute 366.

A married woman cannot maintain any suit or prosecution without joining her husband.—2 Wils. 3, *Roberts vs. Pierson*—2 Black. 1079, *Hatchett vs.* ———.

A married woman cannot be allowed to bastardize her issue.—Cowper 592.—1 Mass. Stat. 299.

*Mr. Smith for plaintiff.*—1. The section of our statute under which this prosecution was commenced, is an exact transcript of the statute of 6th George 2d, Chapter 31, which provides, "that if any single woman shall be delivered," &c.—1 Ba. Abr. 319 and 20, title Bastardy.

In the *King vs. Luffe*, 8th East. Rep. 204, the court say, that when a child is born out of lawful matrimony—that is, out of the limits and rights belonging to that state—it is the same in substance as the question whether it be a bastard, and that a child born by adulterous intercourse, is as much within the provisions of the act of Geo. 2d, as one which is born of a single woman. The cases of the *King vs. Reading* and the *King vs. Bedale*, were both after the statute of Geo. 2d, and yet no objection. It is a consequence which follows of course from establishing the bastardy of the child, that it was born out of lawful matrimony, in the proper sense of those words as applied to the subject matter.

In Pennsylvania it has been decided, that when the husband has access to the wife, no evidence short of absolute impotence of

the husband, is sufficient to convict a third person of bastardy with the wife.—*Commonwealth vs. Shepard*, 6 Binney 283. Referred to in 2d Starkie 219, in note.

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2. It is contended, that the proceeding in case of bastardy, under our statute, so far partakes of the nature of a criminal proceeding, that the complainant being a *feme covert*, forms no objection to a proceeding in her name. The statute requires the complaint to be in writing and on oath by the mother of the child, and from the nature of the facts required to be stated in the complaint, no other person but the mother could make the complaint.

In North Carolina it has been decided, that a married woman may make the oath required by statute, accusing a man of being the father of a bastard child, begotten before her marriage.—*Wilkie vs. West*, 1 Murphy 319. Referred to note in 2d of Starkie, 220.

Again: The proceeding is not designed to secure a compensation to the mother, but simply to compel the father to aid in the support of the child. This is apparent from the fact, that the overseers of the poor of any town, which is charged or likely to be charged with the support of the child, may either commence a prosecution already commenced by the mother.

The opinion of the court was delivered by

REDFIELD, J.—The only question decided is, whether a married woman can sustain a prosecution under our statute relating to bastards and bastardy, for the purpose of affiliating a child conceived and born during coverture, by proving total want of access of the husband.

No doubt such offspring is illegitimate and bastard. It is well settled at common law, that the issue may be bastardized, although born during coverture, by showing want of access, immaturity or imbecility of the husband, or any other cause which renders it impossible he should have been the father of the child; but want of access cannot be proved by the wife.—*King vs. Inhabitants of Ren*, 1 East. 132—*King vs. Reading* and *King vs. Bedale*, cited 4 Petersdorff 180—*Thomson vs. Saul*, 4 T. R. 356—*Rex vs. Luffe*, 8 East. 199—*Dor ex. dem. of Lomox vs. — et al.* 2 Strange 940—See also 4 Petersdorff 175-6-7.

The cases above cited show too, that a prosecution under the English statutes upon this subject, may be sustained on the complaint of a married woman. But the prosecution there is always in the name of the King and for the benefit of the parish likely to

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become chargeable, and in no event can the mother ever derive any advantage from it. If the person accused gives sufficient security to indemnify the parish, the prosecution ceases. And although the English statute of 6 Geo. 2d contains a provision in terms similar to our own, that the proceedings shall be upon the complaint of a "single woman," yet, as that statute was passed in aid of the 18th of Elizabeth, upon the same subject, they have received the same construction.

During the reign of Elizabeth, incontinence seems to have received very just reprobation, and to have been viewed with more than usual horror. The very title of the statute of the 18th of Elizabeth would seem to indicate this: "An act concerning bastards begotten and born out of lawful matrimony, an offence against God's law and man's law." From a view of both statutes, the English courts say, that a married woman who becomes the mother of a bastard child, is *quasi* a "single" woman, at least *quoad hoc*; and that every child begotten in violation of the just obligations of the nuptial rights, is "begotten" and "born" "out of lawful matrimony." This is most evidently a forced and unnatural construction, and resorted to for no better reason than to cover a *casus omissus* in the statute. And such a construction is surely quite allowable with reference to both statutes, and when the nature and object of the prosecution in Britain is considered.

But here the prosecution, although in form criminal, is in fact a civil remedy in favor of the mother, to compel the father to contribute to the maintenance of the child. As such the process is amendable and must be presented by guardian or *prochein ami*. If the plaintiff is an infant, bonds for cost are required and the proceedings are held in all respects to be in their nature civil.— This being the case, it is enough for us to enquire whether the statute gives any such remedy in the case of a married woman. For we cannot provide remedies which the law has not. And the terms of our statute upon this subject, are very explicit: "When any *single* woman shall be delivered of a bastard child." The term "single woman" is here most evidently used in contrast with and a direct antithesis of "married woman." How, then, can this court say the terms are synonymous, or that the former includes the latter? This would be doing violence to every principle of sound construction, and must assuredly outrage and defeat the intention of the legislature, as expressed in the unequivocal terms of this statute. We might almost as well decide that the term "single" was used to distinguish *one* from many, (as it sometimes is



indeed as that it signified married. Argument or illustration of a proposition, so palpable to sense and so obvious to perception, is labor lost. The terms of the statute, measured with reference to the subject matter, is the only sure basis of construction. Beyond this all is limitless conjecture and judicial legislation.

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The judgment of the county court is affirmed.

### HEMAN FASSETT vs. ADI VINCENT.

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The defendant, in an action on book, may prove by his own oath, that he has delivered up to the plaintiff, in pursuance of an agreement between them, a note which he held against the plaintiff and another, in payment of the plaintiff's account.

This was an action on book account, commenced before a magistrate and carried by appeal to the county court, by whom it was referred to an auditor. At the trial before the auditor, the defendant exhibited a charge on book against the plaintiff, of \$10 04, being the balance due on a note signed by the plaintiff and one Carr. The defendant offered his own oath to prove an agreement between himself and the plaintiff, that the note in question should be applied upon the plaintiff's account, and also to prove that he had delivered said note to the plaintiff for the purpose of being so applied. But the auditor decided that the note in question was not a proper subject of book account, and that defendant's oath could not be admitted in support of it.

The county court sustained the decision of the auditor, whereupon the defendant excepted.

*Mr. J. J. Beardsley for plaintiff.*

*Mr. Stevens for defendant.*

The opinion of the court was delivered by

WILLIAMS, CH. J.—The defendant should have been admitted to prove by his own oath, that the note specified was to be applied in payment of the plaintiff's account, and that he had delivered it for that purpose to the plaintiff. The auditor was probably correct in his opinion that a note is not "a proper subject of book account," but erred in his application of that principle to the case in controversy. If the articles, delivered by the plaintiff to the defendant, had been delivered and received in payment of a note,

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no action on book could be sustained for those articles. If a note had been delivered up by the defendant to the plaintiff, in payment of the book account of the plaintiff against him, and been so received, it was as proper for the parties to testify to such payment in the action on book, as it would to a payment in any other way or in any other article. The offer made by the defendant, was to prove payment of the plaintiff's account in this way, and we think his testimony to that effect should have been received.

The judgment of the county court must, therefore, be reversed and the cause again referred to the same auditor to report at the next term.

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#### JOHN GILMAN AND WIFE vs. JEREMIAH S. MORRILL.

An estate devised to two sons of the devisor, creates an estate in common, if there is nothing said in the devise that the estate shall be joint.

When one of the devisees dies intestate and under age and without issue, the mother inherits a part of the estate devised to him, with the surviving brother; notwithstanding the will was made and the testator died previous to the passing of the present probate act.

Petition for partition—and Plea denying the alledged tenancy in common. The property in question was real estate, devised in the year 1815, by Jeremiah Morrell, deceased, in the first place to his wife Peggy, one of the petitioners, so long as she should remain his widow and unmarried; and whenever the interest of said Peggy should be terminated, to his two sons, Joseph and Jeremiah. Joseph died a minor and unmarried in 1824. A short time previous to said Joseph's decease, said Peggy intermarried with John Gilman, one of the petitioners. The clause in the will bequeathing to the sons the property in question, read as follows: "I give and bequeath to my two sons, Joseph and Jeremiah, all my real estate, of whatever name or nature, after the interest of my wife shall have terminated."

The defendant contended, that the whole share and estate of said Joseph had become vested in himself. But the court decided, and instructed the jury, that said Peggy inherited the share and estate of said Joseph equally with the defendant, and that the plaintiffs, in right of said Peggy, were tenants in common with the defendant in proportion of one fourth and three fourths. The jury thereupon returned a verdict for the plaintiffs. To which

decisions and charge of the court, petitionees excepted. Exceptions allowed, and the cause passed to the supreme court for revision.

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*Mr. Stephens and Mr. Brown for petitionees.*—The will was executed February 17th, A. D. 1815, and must be so construed as to carry into effect the intentions of the testator, whether the testamentary disposition be such as the court will favor or not.—*Thelusson vs. Woodford*, 4 Vesey's Rep. 311—3 Burrows' Rep. 1634.

From the plain and express words which limit the duration of the widow's estate, we think the court can have no doubt that the intention of the testator was to have the land in question descend only to the heirs of his own body.

Every doubt upon this subject will be removed by a reference to the laws in force when the will was published.

The statutes then in force, so far as regards the present question, were the act of March 10th, A. D. 1797, and the act of November 4th, 1799.

By the first mentioned act, real estate descends to the children, if any; if none, to the next of kin.—See section 27th.

In that act there are but two cases in which a mother is allowed to inherit land from her child. The first is by the 29th section by which it is enacted, that if the child of an intestate dies after arriving at full age, unmarried and intestate, she shall inherit a sister's share. The other case (see section 30th) is where the child has left a widow without issue. His father being dead, the mother then takes the same share as a sister.

The statute of November 4th, 1799, enacts that the widow of any testator may appear before the judge of probate within sixty days after the will shall have been approved, and waive the provision made for her by will and have her dower assigned.

The provision made for the widow by the will, was in lieu and not in addition to dower; she had her election and has made it. She took as a purchaser, that is by contract; and as that contract was understood at the time, so must it be carried into effect. And to us it appears the height of absurdity to contend that the testator intended, in case of the death of either of his minor children, that his widow should inherit.

But the plaintiffs contend that they are entitled to the land in question, by virtue of the act passed Nov. 15, 1821.

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This claim the defendant resists on two grounds :

1. That it was not the intention of the legislature to have that act apply to cases like the present.
2. That had they so intended, they had not the constitutional power to carry their intentions into effect.

That such was not the intention of the legislature, is apparent from the proviso contained in the 110th section of that act, (Revised Statutes, p. 358) which expressly declares that the former probate acts shall be and remain in full force as to all matters and things done or transacted during their existence to all *intents* and purposes, and that this act of 1821 shall not be construed to affect any right or rights accruing or incurred under any of the repealed acts.

The will having been made published and probate thereof granted, during the existence of said former laws, must of necessity be one of those matters and things which the legislature have exempted from the operation of the law of 1821, and as such is not liable to be construed or affected by it.

The two sons of Jeremiah Morrill took by the will a vested and contingent remainder, for by the will he conveyed to his widow at most only a life estate in the premises, with remainder to his sons. The remainder was contingent so far as it depended on the widow's marrying; for it was uncertain whether the event would ever take place, but the remainder was a vested remainder, as depending on the death of the widow, for that is an event certain, the time when only being doubtful.

The children of the testator had not only an interest as tenants in common of this remainder, but also a reciprocal interest in each other's estate; for if either died within age, unmarried and without issue, the survivor inherited the whole. This was a valuable interest, as the event has proved.

This interest commenced upon the decease of the testator, and whether the right to this interest was created by virtue of the will or by force of the statute, is immaterial; for by the before-mentioned proviso it is enacted, that the act of 1821 shall not be so construed as to affect any right or rights, accruing or incurred under any of said repealed acts or sections of acts.

*Mr. Smith for petitioners*—It is contended by the petitioners :

- 1st. That by the will of the testator, Joseph and Jeremiah on the intermarriage of the said Peggy with the said John Gilman, took an estate *in fee simple*. *A devise of all the testator's real*

*estate*, is a devise in fee simple.—See 17 *Mass. Rep.* 68—6 *John. Rep.* 188—12 *do.* 389—15 *do.* 169.

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2d. By the 75th section of an act constituting probate courts, &c., passed Nov. 15, 1821, (Revised Laws, page 334) the said Peggy took, as heir, to the said Joseph, an undivided half of his interest and estate in said premises, and thereby became tenant in common with the said Jeremiah S. Morrill, the other and only heir to the said Joseph.

The opinion of the court was delivered by

WILLIAMS, CH. J.—The petitioners do not claim any interest in the premises, by virtue of the will of Jeremiah Morrill the elder. All the interest in his estate, which Peggy Gilman, one of the petitioners, has under that will, ceased on her intermarriage with John Gilman the other petitioner. But they claim one half of the estate, which belonged to Joseph Morrill deceased, on the ground that his estate is to descend, or be distributed to his brother and mother equally.

To decide this question, it seems only necessary to ascertain what estate Joseph and Jeremiah S. Morrill took under the will of their father. For if they took an estate as joint-tenants, then the argument which has been advanced would be unanswerable. The right of survivorship would give the whole to the petionee, as surviving joint-tenant.

Under the will of Jeremiah Morrill, his two sons, Joseph and Jeremiah, took an estate in common by purchase. There is nothing in the will which indicates or manifests any intention in the deviser, that the estate should vest in them and be held as a joint-estate. Nothing to that effect having been "said" in the devise, the estate devised is to be deemed and adjudged an estate in common and not in joint-tenancy, agreeably to the 11th section of the statute for the partition of real estate.

If the statute, which was in force in 1815 when Jeremiah Morrill died, had remained unrepealed, Mrs. Gilman would, on the decease of Joseph Morrill, have been entitled to the whole of his share or estate as next of kin. The 29th and 30th sections of the probate law then in force, had reference only to the children of those who died *intestate*. But there is no doubt that our present probate law, which was enacted in 1821, must regulate the descent of Joseph Morrill's estate. It is competent for the legislature to provide a rule of descent, as it respects real estate, and to change it from time to time, provided the law is not retrospec-

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tive. Whatever estate Joseph Morrill had, at the time of passing the present statute, or might thereafter acquire, which would descend to his heirs on his decease, must have been decreed to such persons as the existing law pointed out. His mother, being one of the persons designated by the law, must therefore take a share in his estate.

The statute is not retrospective—interferes with no vested rights of Jeremiah S. Morrill; for he has none in the estate of his brother, neither was there any vested right of inheritance in either of the devisees of Jeremiah Morrill the elder, as has been so strenuously contended by the counsel for the petitioners.

Nor is the fact that Joseph died a minor, incapable of making a will, entitled to any consideration. His estate was no different during his minority, from what it would have been on his arriving at full age. It could have been disposed of during his life, like the estate of other minors, according to the provisions of the statute, and, on his decease, descended like other estates to the persons designated by law.

Considering that Mrs. Gilman does not claim this estate under the will of her former husband; that the two brothers, Joseph and Jeremiah, under the will took an estate in common, and neither had any vested or immediate interest in the share of the other; the only conclusion to which we come is, that on the decease of Joseph Morrill, his estate, in the premises in question, became the property both of his mother and brother, and liable to be divided accordingly.

The judgment of the county court, which was to this effect, must be affirmed.

FRANKLIN LEARNED vs. JAMES BELLOWES.

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In an action of trespass, *de bonis*, sued at the county court, where the *ad damnum* exceeds one hundred dollars, and the county court refuse to dismiss the action for want of jurisdiction, the value of the property being less than one hundred dollars, this court have no authority to reconsider the decision. In a case referred by agreement of parties, it is no ground of setting aside the report that the referees admitted irrelevant or illegal testimony, if it had no tendency to mislead their minds, and did not in fact mislead them. Reports of referees are not to be set aside for every circumstantial error, but only where they adopt a rule of action and misapply it; and in this respect it is immaterial whether it be a rule of law or of equity or of arithmetic. A general release of all "demands, notes and accounts," will not be construed to include a suit pending, especially when, from testimony *aliunde*, it is apparent such was not the intention of the parties.

This case comes here on exceptions taken to the decision of the court below, in accepting the report of referees. The action was trespass, brought originally at the county court, demanding in damages more than one hundred dollars. The referees report, that there was no testimony on the part of the plaintiff tending to show the oxen (which is all plaintiff claimed) of greater value than \$53 50. The defendant moved the county court to dismiss the action. The report further shows, that defendant claimed to hold the oxen by virtue of certain executions, as the property of one Joseph Learned, the defendant being a legal officer and having levied the executions upon the oxen. The defendant having given in evidence certain admissions of plaintiff tending to show, that the oxen belonged to Alanson Learned, a son of Joseph Learned, and not to plaintiff. The referees permitted plaintiff to show that, at other times and places, he had made declarations directly the reverse, these declarations not being accompanied with any act of plaintiff. The referees further report, that during the pendency of this suit, plaintiff and defendant executed to each other mutual receipts, of which plaintiff's to defendant, the following is a copy:

"Received of James Bellows ten dollars, which is in full of all demands, notes and accounts, up to this date.

(Signed)

FRANKLIN LEARNED."

"Fairfax, August 14, 1834."

The referees add, that "in all things they intended to decide according to law."

The report was in favor of plaintiff and accepted by the county court, and the motion to dismiss the action for want of jurisdiction overruled.

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*Mr. Smalley & Adams and Mr. Hubbel for defendant.*—Although referees are not bound to follow the law, yet, if they attempt to decide according to law and err, their decision will be corrected by the court.—*Johns vs. Stevens et al.* 3 Vt. Rep. 303, and a case then cited by Ch. J.

“When from the writ the court *prima facie* has jurisdiction, but from the plaintiff’s own showing, it appears on the trial that his debt or demand is not sufficient in amount to give the court jurisdiction, the course is to dismiss the action on motion. Such has always been the practice, and if it did not prevail, it would be in the power of the plaintiff to give the court jurisdiction in evasion of the statute, in any case, by merely declaring for or demanding a sum exceeding one hundred dollars.”—*Southwick et al. vs. Merrill*, 3 Vt. Rep. 320. But it is said in the same case, that “in actions of tort, when the damages are uncertain and rest in the decision of the jury, the damages demanded must be the criterion of jurisdiction.

But how are the words, “*uncertain damages*” and “*jury’s discretion*,” to be understood? There must be some limit to such phrases. For a trifling trespass, inadvertently committed, an action might be sustained; but for such, when the actual damage does not exceed a few shillings, or at most a dollar, would a jury be justified in giving more than a hundred dollars? I think not. Neither do I think a jury would do it; and if a jury would not, can it be competent for courts to set up a jurisdiction which no honest and rational jury can follow out, or common justice sanction? All that was meant, then, by the above expression of the court in the case cited, was, that when it was uncertain, whether a sound discretion might not say, the damages were a little less or a little more than a hundred dollars, the court would not be quibbled out of their jurisdiction. In cases like the present, there is but little uncertainty as to the amount of damages, the statute declaring that no more than actual damages shall be recovered; and the case shows that the oxen were a middling or an ordinary pair, and no witness calculated them higher than fifty-three dollars.

2. It appears from the report, that the plaintiff was permitted to show his own declarations unaccompanied by his acts, and not made in the presence of the adverse party, nor at the times spoken of by the defendant’s witness. It does not require an argument to show the absurdity of such a doctrine.

3. It is insisted, that the receipt being in full of all demands, discharges the suit; for in Swift’s Dig. Vol. 1, p. 300, it is said,



that "the word demand is of the most extensive import, and a release of all demands discharges all manner of actions, real, personal, and mixed, rights and titles, conditions before or after breach, Executions, Covenants and Contracts." And again, p. 301 it is said that "when the parties intend to settle every matter between them, the release should use the words, *all demands*: if it is not intended to be a general release, it should comprehend only the particular matter to be discharged." If all claims except a particular one are to be discharged, the release may be general with the exception of the matter not meant to be discharged.

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*H. R. Beardsley, for plaintiff.*—Three exceptions are taken to the Referees Report filed in this case.

1. That the County Court had not original jurisdiction of this cause.

2. That the Referees permitted the plaintiff to prove his own declarations, unaccompanied by his acts, and not made in the presence of the other party.

3. That the receipt referred to in the report, operated to discharge the suit.

1. As to the first exception, it is sufficient to say, that the question of jurisdiction, cannot be made to depend upon the amount of damages recovered. In all cases of uncertain damages, if the sum found in damages, be within the jurisdiction of a justice of the peace, the County Court is not thereby ousted of jurisdiction. *Gale vs. Bonga.* 1 Chip. Rep. 208.

2. There does not sufficient appear in the Report on which to ground this exception.

1. It does not appear that the testimony admitted by the referees had any possible bearing, or connexion, in the trial of the case, or that the referees were in any degree influenced by it.

2. Referees are not bound by the same strictness of rules, in regard to the admission of testimony, that the courts of law are.

3. The Report does not show any thing from which the Court can determine that another hearing would avail the defendant, or that the triers would not probably come to the same result, without that testimony or that any injustice has been done.

As to the last ground of exception to the Report we are unable to discover, what the Court have to do with it, until it is properly placed upon record by plea. But suppose the question aris-

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ing upon the receipt to be properly presented. It has no reference to this suit.

In the first place James Bellows has no interest in the subject matter of this suit, except what results from being nominal defendant on the record. Beeman is the party in interest. Hence it is not to be supposed the parties to the receipt, had this suit in view at the time of its execution.

Again, the words *all demands*, are limited in their operation, by the words *notes and Book Accounts*, which serve to show what was intended in their settlement.

It appears also that they executed mutual receipts of the same description, which shows that they had mutual claims against each other, different from the present suit, and the legal presumption is, that these only were intended to be embraced in the settlement, and covered by the the receipt.

The opinion of the court was delivered by

REDFIELD J.—The motion to dismiss the action was correctly overruled for two reasons. It being always a matter of discretion whether the court will dismiss an action sounding in damages merely, when the *ad damnum*, brings the case within the jurisdiction of the County Court, they should not do this after a reference and report. And they should never do it in any case admitting of doubt, even in the mind of the plaintiff. If he had any rational ground of believing he could in any event recover more than one hundred dollars, he ought not to be turned over to an inferior jurisdiction, after the case has already been investigated.—*Ladd vs. Hill*, 4 Vt. Rep. 164.

In actions of trespass, it is well settled, that the measure of damages, is not limited by the value of the property. The value of the property is usually the actual damage. But the jury may even in a case of trespass *de bonis asportatis*, give consequential or exemplary damages, and even vindictive damages; and had a jury in this case given the plaintiff more than one hundred dollars damages, we know of no rule by which this court could set aside the verdict.—*Ladd vs. Hill*, 4 Vt. R 164.—*Southwick, Cannon & Warren vs. Merrill*, 3 Vt. 320.

It is next urged that the report should be set aside for the error of the referees in admitting the naked declarations of the plaintiff. This was no doubt incompetent testimony. It had no legal or moral tendency to show the truth. It only went at most to show

that the plaintiff had made contradictory statements. This might result from interest or want of integrity, but it clearly had no possible tendency to mislead the minds of the referees, nor do they intimate that they relied upon it in any sense, in deciding the case. Indeed they could not, if they were rational men. The plaintiff had distinctly admitted a fact against his interest. His showing that at other times he had asserted the fact to be otherwise, would not in any sense qualify his admission. And although the testimony was improperly admitted, yet as it had no tendency to mislead the referees, and did not mislead them, so far as we can learn, it is no sufficient reason for setting aside the report.

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It has been repeatedly decided by this court, that the proceedings of referees, are to be presumed to be correct unless the contrary is made to appear.—*Hogaboom vs. Herrick*, 4 Vt. 196.—*Stevens vs. Pearson*, 1 Vt. 503.—*Bliss vs. Rollins*, 6 Vt. 529.

Since the decision of the cases, establishing the doctrine, that where referees intend to pursue the law, which would tend to a given determination of the case, but misapply it and thus come to a different result, that their report will be set aside, it is becoming common for referees to conclude all their reports with the same general clause, which is found in the report in this case. The cases of *Johns vs. Stevens*, 3 Vt. 308, and *Hasletine vs. Smith*, 535, were not intended to establish the doctrine that the proceedings before referees would be reviewed in the court in the same manner this court will examine the proceedings of the county court on writ of error. They establish this principle, that if referees adopt any rule of action, whether law, equity or arithmetic, and so fail in its application as to come to a different result from that to which the correct application of their own rule of decision should have brought them, and this is clearly shown, then their report will not be accepted. This is not very different from the well known rule applied to awards, that even at law they will be set aside for evident mistake.

But it is not to be tolerated for a moment that, in the case of every reference in the county court, which is really taking the case from the court and putting it before a tribunal of the parties' selection, the court shall on the return of the report sit to adjudge their whole proceedings and determine just how much of the testimony was relevant and how much was not, and if any part of the proceedings did not conform to the strictest rules of law, on trials to the jury, that the cause must be recommitted. This would es-

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tablish literally endless litigation. And no maxim is of more universal application than *Interest Reipublicae sit finis litium*. And if it is desirable it should be any where applied it is to their domestic tribunals. It could in no sense subserve the ends of justice that such a course of litigation to embroil a neighborhood should be established. These domestic tribunals, when they keep by the great principles of right are as likely to do right as any other, but when they attempt a rigid adherence to technical rules, they are fortunate not to be misled. We cannot see that in this case the testimony could have misled the referees.

It was further argued that the receipt, although given while the suit was pending, should bar the action. This could not be pleaded as a technical release, unless the doctrine of Judge Swift were to obtain. 1 Dig. 300. It could only be used as evidence to show an accord and satisfaction of the subject matter of the suit. The writing does not express any such contract. The plaintiff indeed objects that this defence should have been pleaded to the action, and unless specially pleaded could not be urged as a defence before the referees. This objection is of the same character with the defendant's objection to the report on the ground of receiving plaintiff's declarations to qualify or contradict his admissions. It is not expected that referees will require special pleadings and sit to try formal issues either of law or fact. All that is expected is that the suit will be tried on the merits, and no motion in arrest would be entertained after report, for any defect in the pleadings, or even for the total want of all plea.

But we cannot doubt that the parties did not intend this receipt should bar this suit. The amount in controversy, the fact that the defendant was only nominally interested, and that the ultimate liability rested on the creditor, and that no allusion is made to any suit whatever in the receipt, fully show such could not have been the plaintiff's intention. And in these general releases courts have been very liberal in examining all the circumstances of the parties and the manner of giving them in order to come to the intention of the parties, 1 Swifts Dig. 300, 301 14—Petersdorff 203 and 4 and notes. *Morris vs. Philpot*, 2 Modern 279 *Knight vs. Cole* 1 Lev. 273—The word "demands" is indeed very general, but has no natural fitness to express a matter now in suit, and when followed by the words "notes and accounts" every one must conclude it was used in its restricted signification, as in common parlance, synonymous with notes and accounts. A merchant or mechanic speaks of his "demands", he intends to express only "notes and accounts."

A release of all actions does not include causes of action (14 Rl. 203) Release of all "actions and demands" does not release a legacy. And a general release will not effect *trust* obligations; *Cole vs. Knight* 2 Mod. 279, 1 Lev. 235. We are well satisfied this receipt should not be construed to bar this action. Judgment of County Court affirmed.

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REYNOLDS and WINES, vs. ASA M. FRENCH, ET AL.

A party may recover upon a promissory note which has been voluntarily given up to be cancelled.

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If a debtor by false and fraudulent representations as to his situation induce his creditor to deliver up to him his promissory notes upon payment of a part only of what is due, the creditor may upon proof of the fraud recover the balance of his debt in an action on the note.

This was a declaration in assumpsit upon three promissory notes and containing general counts. Plea, *non assumpsit*.

In support of the action, the plaintiffs offered to prove, that on the 17th day of March, A. D. 1834, the three defendants came to the plaintiffs and represented to them that the defendant French had honestly disposed of all his property in payment of his debts, out of which he had saved the sum of \$451,16 for the plaintiffs which he was ready to pay to them if they would receive it in satisfaction and full discharge of said notes. That the other defendants being insolvent, and the plaintiffs believing said representation as to French to be true, they received said sum of \$451,16, and gave up said notes to be cancelled. That said representation as to the situation of French was false, he having conveyed his property for the purpose of effecting said compromise, and having obtained a reconveyance of it shortly after the notes were given up. This evidence being objected to was rejected by the court.

The case comes here upon exception taken by the plaintiff to the decision of the court below rejecting the testimony offered.

*H. R. Beardsley, for plaintiff.*—It is not perhaps necessary to discuss the question whether the plaintiffs can count directly on the notes; for whether so or not, they have we apprehend a most ample remedy, and show a most unquestionable right under the general counts.

The facts offered to be proved by the plaintiffs if established, would have shown a most palpable and gross fraud practised by the

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defendants on the plaintiffs, by means of which the compromise was brought about and the notes in question delivered up. The defendants then, having obtained the notes by means of false representations and downright fraud, have the plaintiffs a remedy in the present form of action?

Actions of assumpsit on the money counts, are resorted to as substitutes for bills in chancery, and are encouraged wherever the law affords no other remedy, and where a court of equity would compel a defendant to repay to a plaintiff, money which the latter had been compelled to pay for his benefit. And it is the peculiar remedy in cases, when one person has got money belonging to another in his hands through fraud or mistake, and which in equity and good conscience he ought not to retain.

These principles are unquestionable, and the only difficulty which can in modern times arise in relation to them, is in their application. If any state of facts can ever exist, which would so fashion a case, as to call for the application of these well-established general principles, they exist in this case. The books are full of cases, in which it has been held, that if one person pays money, even through mistake to another, the former may maintain assumpsit for money had and received against the latter to recover it back, *Brown vs. Williams*, 4, Wend. 360, *Waite vs. Legget*, 2 Cowen 195, *Murvatt vs. Wright*, 1. Wend. 355. If in such cases, money may be recovered back, more especially will the action lie to recover money obtained by misrepresentation and fraud.

In an action of this sort, whether money has actually been received or not, is immaterial. Property paid, or received as money is sufficient to support the action for money paid, or had and received, and it is precisely the same as if money itself had been paid or received. *Ainslie vs. Wilson*, 7, Cowen 662. *Armstrong vs. Garrow*, 6. Cowen, 460. *Vt. State Bank vs. Stodard*, 1. Chip. Rep. 157. 1. Swift Dig, 405. *Clark vs. Shu*. 1. Cowp. 197. *Richards et al vs. Hunt*, 6. Vt. Rep. 251. *Irving et al vs Humphrey*, 1. Hopk. Ch. 7. Rep. 284. In the case at bar, the obtaining of the notes under the circumstances, is equivalent to so much money to the defendant, they have thereby the benefit of the fraud, and is the same as getting wrongfully so much of the plaintiffs money. *Tuislor vs. May*, 8. Wend. 561. *Edgell vs. Stanford*, 6. Vt. Rep. 551.

*Smalley and Adams, for defendant.*—The evidence offered by plaintiff and rejected by the Court, was not admissible on any of the counts of the declaration.

No case can be found where the payee of a promissory note, having voluntarily discharged it or given it up to the maker to be cancelled, has been permitted to set it up as the ground of an action. It is thereby *functus officio* and ceases to be the subject of proof as evidence of a subsisting cause of action, and becomes as inoperative as a bond erased or altered in a material part, by the obligee.

If the defendants were guilty of fraud and misrepresentation for which the plaintiff had a cause of action, they should have framed their declaration to their case.

The evidence offered shows an accord and satisfaction, and was therefore inadmissible, as not tending to establish a *prima facie* cause of action in the plaintiff.

But conceding to the plaintiff that defendant represented, and that plaintiff offered to prove that they believing the representation, agreed to accept and did accept \$451.16 in full satisfaction and discharge of the notes on which more was due had therefore gave up the notes to be cancelled; still this is a perfect discharge of the notes.

Without entering into a discussion of the effect of a simple acceptance of a part in satisfaction of the whole of a debt, it is clear that a release of the whole under seal in consideration of receiving a part is a bar to any further suit. When a promissory note is the only ground of a parties liability, giving up the note to be cancelled is equivalent to a release. Here by the case presented by the plaintiff it does not appear that they had any debt or demand against the defendant but the notes that were cancelled by which the defendant might have been but surety for the debt of a third person. Consequently when the notes were cancelled there was an end of their liability and a release was unnecessary.

On another principle the evidence was properly rejected. It does not appear from the plaintiff's statement that two of the defendants were cognisant of the misrepresentation as to French's disposition of his own property. The representation may have been false, and these two defendants in no wise answerable for the consequences; for unless the falsity of the representation was known to all the defendants, no fraud can be imputed to them.—There is no pretence in the offer of the plaintiff that Grant and Thurston knew the representation was false, and it is only from inference that fraud is to be charged upon French. Knowledge of the situation of his property, may as properly be attributed to the plaintiff, as to the other two defendants.

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Though an agreement to receive a less sum in satisfaction of a greater, unless qualified by peculiar circumstances, is not binding on a creditor, no reason can be given why a party may not if he chose, accept a less sum in satisfaction of a greater, and no case can be found where a party knowingly received a less sum than would appear to be due on the face of a note or bond, and give it up to be cancelled has sustained an action thereon.

In *Thomas vs. Heatham* 9 C. L. R. 152, it is said by Holroyd J. that the legal effect of the agreement between a debtor and creditor, that part of a larger sum due should be paid by the debtor and accepted by the creditor as a satisfaction for the whole might be considered to be the same as if the whole debt had been paid and part had been returned as a gift to the party paying.

The question then comes to this, after a party has disposed of his note or his money by gift, can he on alleging, that the object of his bounty made a misrepresentation to him rescinded his gift, and bring an action of assumpsit to recover it back?

The opinion of the court was delivered by

PHELPS, J.—The production of a promissory note is not always indispensable to a recovery upon it. Such production is dispensed with, where the note is proved to have been destroyed, and, in this State, where it is shown to have been lost. The reason why a recovery cannot be had upon a *lost* note which is negotiable in England is, that the note may find its way into the hand of a bona fide holder who may be entitled to payment. But here no such reason exists, as by force of our statute, restraining the negotiability of such notes, the transfer of a note is put upon the footing of an assignment of a chose in action. And it is also true, that a recovery may be had upon a note after it has been voluntarily given up to the maker. This doctrine was fully recognized in *Edgell vs. Stanford*, 6. Ver. Rep. 551.

And it seems immaterial in such case, whether the plaintiff counts specially on the note, or generally in *indebitatus assumpsit*.

If there be any case of the kind where a recovery may be had, it would seem to be that in which the note is obtained from the holder by fraud and imposition. The plaintiff may doubtless treat the transaction, which resulted in giving up the note, as fraudulent and void, so far at least as to the agreement to accept the smaller or new note in full satisfaction. That a Court of Chancery would set aside a discharge given under such circumstances, and revive a security procured to be given up or cancelled by fraudulent representa-



tions, is settled by the case of *Richards et al. vs. Hunt*, 6 Vt. R. 251. If that decision requires authority to support it, it is to be found in *Phettyplice vs. Sayles*, 4 Mason 312 and *Irving et al. vs. Humphry*, 1 Hop. 284.

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Can a court of law afford relief in a similar case? The case is in principle, the same, as if a discharge under seal had been given without a surrender of the notes. In that case a court of law would, upon common principles, treat the discharge as void, if obtained by fraud. The only difference in this case is, that the plaintiff is unable to produce the notes on trial; and in this respect, the cause comes within the rule of *Edgell vs. Stanford*.

The action of assumpsit proceeds upon equitable grounds, and in a case of this nature, where a full and adequate remedy may be had at law upon common principles, there is no good reason for driving the party to the more expensive and less expeditious remedy in chancery. In *Richards et al. vs. Hunt*, no relief could be had at law, as the party was discharged [for imprisonment on the execution. No suit could be sustained upon the jail bond, as there was no escape, and as to the judgment, there was an apparent satisfaction of record.

In this case no technical difficulty is encountered. We are therefore of opinion, that the evidence offered in the court below should have been admitted. We do not deem it necessary to decide upon which count the plaintiff may be entitled to recover, though, if the amount of the notes be still due, it is difficult to discover any good reason why the party may not recover upon either.

It is suggested that some of the defendants may have been sureties, and upon this assumption it is argued that if the notes have been voluntarily given up the sureties are discharged. It is unnecessary to discuss that question, as it does not appear on record that any of the defendants are sureties. The evidence having been rejected the fact was not ascertained. Should it so appear upon a future occasion, it will then be in due season to determine its effect.

It is also urged that the reception of parol proof is dangerous, as there may have been endorsements on the notes, of the purport of which no proof can be had. This argument however applies with equal force to all cases of actions upon notes lost or destroyed. But in this case, the notes were given up to the defendants, and of course the evidence of such endorsements is still in their own power, unless they have of their own motion destroyed them.

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The remarks of the Chief Justice in *Edgell vs. Stanford* are relied upon as sustaining the position, that if a note be voluntarily given up to be cancelled it can not afterwards be made the ground of recovery. The remarks alluded to were made with reference to the mere substitution of one security for another, and to the question, with respect to which different decisions have been had, whether the acceptance of a new security of no higher nature is a satisfaction, or whether the party may resort to his original cause of action. He had no reference to a case like this. Indeed the whole drift of his opinion was to establish the right of recovery in such a case.

Judgment reversed and cause remanded to county court for a new trial.

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#### ORANGE FERRISS vs. D. S. BARLOW.

The statute of limitation does not run upon a judgment, while the judgment debtor is imprisoned on the execution; but begins to run, upon the discharge of the debtor, under the act for the relief of poor debtors.

Such a case is within the statute, and the action of debt is barred after the lapse of eight years from the date of such discharge.

This was an action brought upon a judgment rendered by Franklin county court at their September term A. D. 1824. Plea statute of limitations. Replication that the defendant was committed to jail on the execution issued upon the judgment and on the 1st day of September 1826 took the poor debtors oath and departed from the limits of the prison. To this replication the defendant demurred.

*H. R. Beardsley for plaintiff.*—The question presented by the demurrer is whether a judgment upon which an execution has issued, and the debtor been committed to jail, and legally discharged under the act, “relative to jails and jailors,” and “for the relief of persons, imprisoned therein,” is exempt from the operation of the statute of limitation.

By the 13th section of the aforesaid entitled act, it is enacted “that all and every such judgment obtained against any such prisoner shall notwithstanding such discharge, be and remain good and effectual in law, to all intents and purposes, against any estate whatever, which may then, or at any time afterwards, belong unto any such prisoner, &c.”

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Now if the statute of limitation is to be regarded as having any application to a judgment thus circumstanced, the aforesaid provision of the statute is wholly nugatory. The statute if it run at all on this judgment began to run at the date of the judgment.

Suppose, then, that the defendant had remained upon the limits of the jail yard until one year before this suit was brought, and then discharged under the act; and six months after the discharge property to the amount of a thousand dollars came to his possession for the first time since his commitment, could it be contended in that case, in a suit upon the judgment and the property attached thereon, that the judgment would be barred? We apprehend not. And if not in that case, we see no good reason, why, under the statute, the judgment may not now be enforced against the estate of the defendant.

*A. and A. O. Aldis for defendant.*—The case turns upon the construction of the 5th sec. of the “act in addition to an act relating to jails and jailors” passed in October 1823.—*See Comp. Stat. p. 241.*

We contend that the expression in the first part of the section “at any time afterwards”—must be governed in its construction by the statute of limitations; and that it was not the intention of the legislature, that judgments against prisoners discharged from imprisonment by virtue of the act should be exempt from the operation of the statute of limitations.

1. By the common law execution by imprisonment was a satisfaction of the debt *quoad* the defendant. So that if he died in jail or was discharged by the plaintiff no other execution could be issued against him or his goods.

By the stat. 21, Jas 1 c. 24, if defendant died in jail a new execution might issue against his property.

The Lord’s act passed 32, Geo. II, was the first proper act of jail delivery enacted in England and from that original our act was probably drawn. That act contains a proviso similar to our own; by which when the defendant is discharged from imprisonment the judgment is preserved and valid as against his property.

It is most evident that this proviso was meant to guard against the doctrines of the common law—that imprisonment was satisfaction. This was its object, and it settled a point otherwise doubtful. 3 Bl. Comm. 415.—16 and note 6.—6 T. R. 526 *Clark vs. Clement*.—7 T. R. 520 *Tanner vs. Hague*.—2 Tidd Prac. 978.

2. Such a construction as we contend for is required by the language of the statute taken literally. The statute says that the

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judgment shall remain good and effectual in law against the estate of the prisoner and a new execution issued at any time "*in the same way and manner as might have been done if the prisoner had never been in execution.*" This last expression applies not to the issuing of execution alone, but to the whole section.

Now if the prisoner had never been in execution the judgment would certainly be barred by the statute of limitations.

3. If the expression "at any time afterwards" when connected with the judgment is to be taken in its literal and absolute sense—then by the same rule of interpretation the words "at any time," used in connection with the issuing of execution should be taken in the same sense. Such a construction is manifestly absurd, and would establish a most dangerous practice.

4. There is no reason why judgments against prisoners discharged under this act should be placed on different grounds from other judgments. By issuing a summons against the defendant at any time within eight years after the rendition of the judgment, the plaintiff could have presented his right of action.

The opinion of the court was delivered by

PHELPS, J.—The only question raised in this case is, whether the statute of limitation applies at all to a judgment, upon which the debtor has been committed, and discharged under the act for the relief of poor debtors.

On the part of the plaintiff it is insisted, that the terms of the act expressly exempt the case from the operation of the statute of limitation. And on the other hand, it is claimed by the defendant that the general expressions in the act must be understood and taken subject to the provisions of that statute, and that the expression "at any time thereafter" is to be qualified, as meaning any time within the period allowed by the statute of limitation.

It seems agreed on all hands, that the statute of limitation would not run upon the plaintiff's remedy so long as the defendant remained in custody on the execution. This results from common and well established principles applicable to all statutes of limitation. Whether we consider the statute of proceeding upon the presumption of payment or as an arbitrary rule of policy, intended to compel a speedy enforcement of all claims, and as shutting the door upon the litigation of such as are stale, is, in this respect, unimportant. On the one hand, no presumption of payment can arise, while the debtor is in custody upon the execution, and on the other hand the statute, as a rule of policy, could with no propriety be

enforced against a creditor guilty of no negligence, but diligently pursuing his legal remedy.

At the same time, the statute could attach to the remedy by debt or *scire facias*, only from the time when the cause of action accrued, which must necessarily be after the debtor has been discharged from imprisonment. In this case however the cause of action arose immediately upon the discharge of the defendant in September 1826, and the present writ was not sued out until January 1835, a period of more than eight years thereafter. The plaintiff's action is therefore barred by the statute, if the statute be applicable at all to such a case.

A literal construction of the statute for the relief of poor debtors would, if taken without reference to other statutes upon the same subject, exclude this case altogether from the operation of the statute of limitation. But it is a settled rule of construction, that all statutes *in pari materia*, are to be taken together, in ascertaining the intent of the legislature. Both the statutes in question are part of the compilation of 1797, and it has been held, and with great propriety, that the several acts of this compilation are to be considered as passed simultaneously, having no priority in point of time, but constituting parts of one general system.—See *Ashly vs. Harrington*, 1 D. Chip. 348. The words of the statute of limitation are as general and unqualified as those of the act above alluded to. Nothing therefore is gained by resorting to a literal interpretation on either side. The words “at any time thereafter,” in our statute, are no more comprehensive than the words, “all actions of debt or *scire facias* on judgment,” in the other; and the want of any qualification or exception, in one case, affords no stronger ground of argument than the like want of qualification or exception on the other. The true mode of interpreting these acts is, to consider them as qualifying each other. The provision that the judgment notwithstanding such discharge, shall remain good and effectual in law, as against any estate which, may then, or at any time thereafter, belong to the debtor, is to be taken as subject to such general regulations, as by law attach to the remedy by action of debt or *scire facias*, and among others to the limitation in point of time to bringing the action. On the other hand, this provision qualifies the statute of limitation, so far as to suspend the operation of that statute, until, by means of the discharge of the debtor from imprisonment, the remedy would accrue.—See *Baxter vs. Tucker*, 1 D. Chip. 353.

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The obvious purpose of this provision was to remove the technical bar growing out of the imprisonment of the debtor, which, at common law, is a legal satisfaction of the debt. This being its manifest object and purpose; we are not at liberty to consider it as intended to create an exception to the statute of limitation. The provision contains no reference to that statute, nor does it provide that the action of debt may at any time thereafter be brought. It merely subjects the property, which the debtor may then have, or may afterwards acquire, to the operation of the judgment; and the most which can be contended for is, that the judgment shall be effectual, to be enforced against the property of the debtor, in the same manner, as if the person of the debtor had not been discharged. There is no reason for supposing that it was intended to place such judgment upon a peculiar footing, or to exempt it from the action of general statutes. The argument drawn from the supposition that the debtor remains in jail during the whole period of the statute, is answered by the decision, that the statute begins to run only from the time of discharge.

The judgment of the county court is reversed, and judgment that the replication is insufficient.

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THOMAS CHAMBERLAIN vs. W. HOPPS and W. HOPPS, JR.

Delivery is essential to the validity of a promissory note.

The maker of a promissory note takes it from the holder, for the purpose of obtaining the signature of a surety. Another signs as surety, but the principal refused to re-deliver the note. The surety is not liable to a suit on the note.

This was an action of assumpsit upon two promissory notes described in the declaration.—Plea, general issue.

The plaintiff in support of his declaration offered to prove that the notes in question were executed by the defendant for a certain piece of land. That the defendant, William Hopps Jr. called on the plaintiff who resides in Burlington and concluded a trade with him for the land. Upon that occasion the plaintiff executed his bond to the defendant William Hopps Jr. conditioned to deed the land to said Hopps upon the payments of the notes in question—and at the same time the said Hopps Jr. executed the notes in question. That the plaintiff proposed to said Hopps Jr. to procure the other defendant William Hopps to sign said notes as surety, which Hopps Jr. agreed to do, and the plaintiff banded said notes

to the said Hopps Jr. for that purpose. And thereupon Hopps Jr. executed the following receipt to the plaintiff for the two notes together with other notes therein described executed and delivered by said Hopps Jr. at the same time and for the same purpose.

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" Burlington, March 16th, 1833.

" Received of T. Chamberlain twelve notes purporting to be notes against William Hopps Jr. and William Hopps and signed by William Hopps Jr. these notes are received for the purpose of obtaining the signature of William Hopps, which I agree to obtain, and return the notes of T. Chamberlain by the 1st day of May next. Said notes all bear date March 16th 1833, six of them are for one hundred dollars each, and one of \$36,00, one of \$30,00, one of \$24,00, one of \$18,00, one of \$12,00, and one of \$6,00.

(Signed by)

WILLIAM HOPPS, JR."

That said Hopps Jr. took the notes and within the time specified in the receipts presented the same to said William Hopps and procured his signature thereto. That said Hopps Jr. again took the notes into his possession and still holds the same, and also that said defendant was served with notice to produce the same on trial. To the introduction of this proof the defendant objected and the same was rejected by the court as insufficient to entitle the plaintiff to recover.

The plaintiff excepted to this decision of the court below upon which the cause was ordered here for revision.

*H. R. Beardsley for plaintiff.*—Whether the present action can be sustained depends upon the question, whether the testimony offered was sufficient to show a delivery of the notes by both defendants—if it was, we are not aware of any other principle of law, which can interpose to prevent a recovery.

It appears by the case that William Hopps Jr. executed and delivered the notes in question to the plaintiff at Burlington—that after the execution and delivery of said notes the plaintiff proposed to said Hopps to procure the signature thereto of William Hopps, his father, as surety. This William Hopps Jr. undertook to do, and the notes were handed by the plaintiff to him for that purpose.

It is believed no doubt can exist that here was a perfect execution and delivery by William Hopps Jr. the contract was complete in all its parts and the rights and liabilities of the parties become fixed.

2. The next question is whether the facts offered to be proved, are sufficient as to constitute a delivery as to William Hopps.

The case shows that William Hopps Jr. in pursuance of his

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agreement with the plaintiff took the notes and presented them to William Hopps for his signature, and that he signed and delivered them to the said William Hopps Jr. Now, if William Hopps Jr. could act as the agent for the plaintiff in this business, certain it is, that the execution of the notes by William Hopps and delivery to William Hopps, Jr. was in contemplation of law a delivery to the plaintiff, and upon such delivery the notes took effect as to both defendant and a liability at once attached.

This then leads to the only *remaining* consideration, namely, whether the plaintiff could legally constitute William Hopps Jr. his agent for this purpose.

We are unable to distinguish this from any other common case of agency—and are not aware of any principle or rule of law applicable to this, which would not obtain in every other case.

At the time William Hopps Jr. executed and delivered the notes to the plaintiff his obligation became perfect, and as to him, nothing remained to be done. The plaintiff could as well employ him as his agent as any other person.

*Smalley and Adams for defendants.*—This action being founded on the joint promissory notes of the defendants the plaintiff is bound to prove a joint liability upon both or he cannot recover.

One signer of a promissory note cannot be constituted the agent of the payee to accept the delivery of a note from his co-signer so as to make the note valid until delivered to the payee or his agent because he cannot at the same time act as principal and agent in the same transaction.

The opinion of the court was delivered by

PHELPS, J.—It is admitted that the plaintiff must prove a joint contract in order to recover. The note in question when delivered to the plaintiff was the note of Hopps Jr. only. It was subsequently delivered to him for the purpose of obtaining the signature of the other defendant. It was signed by him, but never re-delivered to the plaintiff. Did it then ever take effect, as between these parties, as the joint note of the two defendants.

We think not. Although upon its face the joint note of the two, yet never having been delivered after it assumed that shape, it never took effect as a joint contract. Indeed it may well be doubted, whether it even took effect as the several contract of Hopps Jr. If we consider it a part of the original contract that the notes were to be signed by the other defendant then it was an unfinished and imperfect security in the hands of the plaintiff in the first in-



stance, and when delivered to the defendant was wholly inoperative. If then it was never delivered in the shape and terms contemplated by the original contract, it never had any perfect obligation:

If we consider it as perfect in the first instance, as signed only by Hopps Jr. and as being all the contract required, it would be difficult to discover upon what ground the liability of the other defendant could rest; unless upon the ground of an actual delivery of the notes thus signed by both, which might indeed import a consideration, and thus be evidence of a perfect obligation.

It is impossible to treat Hopps Jr. as holding this note, thus executed by both defendants, as the agent of the plaintiff, without confounding all distinctions. A principal in a contract can not be in the nature of things the agent of the other party in respect to that contract. The contract may indeed constitute him an agent for some collateral purpose, but the essential requisite of a *delivery* of such a security is not to be evaded by such a supposition.

We consider the undertaking of Hopps Jr. to be substantially, to procure and deliver a note of a certain description, and this as a part of the original contract for the land. His refusal to deliver the note was, in effect, a refusal to complete that contract. He may perhaps be liable for such refusal, or perhaps, as between him and the plaintiff, he may be liable in trover for the note. But whatever may be the case as between them, the plaintiff can have no remedy against Hopps Sen. Further, Hopps the elder was a surety merely for his son. How then could he be held, if his principal refused to deliver the joint security? And if made liable, how can he have a remedy against his principal? If the signature of the father was required by the original contract, the son could not be required to indemnify him unless he chose to bind him by delivering the security when it was perfected. If it was not required by the original contract, then the procuring the signature of the father was a mere voluntary courtesy on the part of the son which he was not bound to perform. If then he chose not to make the father holden, how can it be said that the father is at all events liable, and the son bound to indemnify him?

We are of opinion that the evidence was rightly rejected, and that judgment must be affirmed.

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1830.

Chamberlain  
vs.  
W. Hopps &  
W. Hopps Jr.

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✓ A person assuming to act as the agent of another without authority may be made liable on the contract as principal. Or if the nature of the case do not admit of such remedy he may be made liable for all damages by action on the case as for a deceit.

✓ Thus assuming to act is *prima facie* fraudulent and the plaintiff need only show the acting as agent without authority and his damages sustained thereby.

The *onus probandi* to disapprove the fraud is on the defendant.

This was a special action on the case for deceit, commenced against the defendant Foster and one John Taylor against whom a *non est inventus* return was made by the Sheriff.—Plea, general issue.

The declaration alleges that the plaintiff was the owner of a piece of land in St. Albans, and the defendant and said Taylor assuming to be agents and attorneys of one Joseph Weeks, and falsely pretending that they were duly authorised by Weeks to purchase the premises for him, and execute a mortgage deed for the security of the purchase money, the plaintiff deeded the land in question to said Weeks and took of the defendant and Taylor a certain note in payment against Luke Sealey and Nathaniel Bowker, and for the security of the said note the defendant and Taylor as agents and attorneys of Weeks mortgaged back the premises in question to the plaintiff, the condition of which mortgage was that the said note should be paid or collected by due course of law; that the note was never paid, Sealey having left the state, and Bowker having sworn out of jail in a suit upon said note; that the plaintiff brought a bill in chancery to foreclose the mortgage against said Weeks which was dismissed on the ground that the defendant and Taylor had no authority from Weeks to execute said mortgage.

Upon the trial of the case it appeared that nothing had been realized by the plaintiff on the note against Sealey and Bowker. It further appeared that for some days previous to the execution of said mortgage a negotiation had been on foot between said Weeks and the plaintiff relating to the transfer of real estate and other business connected therewith—that Weeks was very low with a fit of sickness; and that in consequence of his inability to transact business in person, he executed to the defendant and Taylor a power of attorney. This power was conceded to be invalid.

No evidence was given tending to show that any conversation passed between the plaintiff and his counsel and the defendant previous to the execution of the mortgage relative to the giving of said mortgage or to the contract evidenced thereby, or to the ex-

ment of defendant's powers as attorney of Weeks. It appeared that the treaty was conducted with Taylor—and that after the terms were settled, and the mortgage drawn the defendant was called on by Taylor and joined in executing the mortgage.

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The defendant having discharged Weeks called him as a witness, and offered to prove that in conversation between Weeks and the plaintiff in relation to the business aforesaid a few days previous to the execution of said mortgage it was understood and expressly agreed—that the plaintiff should take the note against Sealy and Bowker at his own risk and without any guaranty or security whatever. This evidence was objected to—and the court decided that if the evidence was to be followed with any proof going to show that the plaintiff obtained the mortgage by means of any false account of the previous understanding between himself and Weeks, it would be admissible but otherwise not; and it not being proposed to furnish any such additional proof the witness was excluded.

The plaintiff also gave evidence of the costs incurred by him in the chancery suit aforesaid, and of the costs recovered by Weeks therein and paid by the plaintiff—to the allowance to which in this action the defendant objected.

The court decided and charged that the plaintiff was entitled to recover. Verdict, for plaintiff for \$170,65, being for the judgment and committing fees against Bowker and the cost in chancery aforesaid with interest thereon. To these decisions the defendant excepted.

*A. and A. O. Aldis for plaintiff.*—1. The agent who assumes an authority he has not, or who exceeds his authority so that his principal is not bound, makes himself personally liable.—2 Kent Comm. 630 and cases there cited.—8 Mass. 189.

2. For such unlawful assumption of authority the agent is liable in a special action on the case, and in such action it is not necessary to show actual fraud on the part of the agent.—2 Kent Comm. 631-2.—11 Mass. 97 *Long vs. Coburn*.—16 Mass. 461 *Ballou vs. Talbot*.—2 Greenleaf 14.

3. The mortgage is in legal form and would have bound Weeks if the agent had authority to execute it.—11 Mass. 98 (as above.)—Pal. on Ag. 152-3.—1 Liv. on Ag. 105.—2 East. 142 *Willis vs. Bach*.

4. The mortgage was offered to show the fact of the unlawful

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assumption of authority, and being offered for this purpose it is immaterial whether it was in legal form or not.

3. The plaintiff is not bound to show what passed between Taylor and Foster, or between them and Weeks.

6. That previous to the execution of the mortgage the plaintiff had made a different agreement with the principal from that which he finally made with the agent does not, by itself alone, show fraud on the part of the plaintiff. This change in the contract might have happened honestly, and if so the law will not presume fraud.

Had Clark arranged the whole contract with Weeks except the mere execution of the writings, and then refused to proceed further unless the agent would consent to this change, it would not have been fraud.

7. The costs of the bill of foreclosure form a part of our damages, as plaintiff was led to adopt that remedy by their unlawful assumption of authority.

8. The amount of the notes not paid or collected, and which the mortgage was intended to secure is also a part of plaintiff's damages.—11 Wend. 485, *Feeter vs. Heath*. For,

1st. Weeks is not personally liable. The mortgage was to secure the payment or collection of debts on which Weeks was not liable. No writing was executed to plaintiff from the agent except the mortgage deed.—5 Mass. 11, *Banorjee vs. Hovey*.—4 Kent Comm. 145.—1 Pow. Mort. 16, Note 2.

2. Even if there be a remedy against Weeks the plaintiff ought still to have this action against the agent.

The mortgage was the main inducement to the contract, the land being a certain and ample security. To Week's personal responsibility alone plaintiff would not have trusted. Now, if by defendant's wrongful assumption of authority this certain security has failed the plaintiff, the defendant should make it good and not turn plaintiff over to another and uncertain remedy.

3. It is right as between plaintiff and defendant, that the defendant, who has deprived plaintiff of his certain remedy for an uncertain one, should himself be obliged to resort to this uncertain remedy.

*Mr. Smith for defendant.*—The defendant contends that the deed executed by the defendant and John Taylor, ought not to have been admitted to go in evidence to the Jury.

1. Because there is no evidence in the case that Weeks either by himself or by his attorneys ever made a contract with the plain-

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tiff whereby the ultimate collection of said demands against Bowker and Sealy was warranted. The deed itself cannot be considered a contract of warranty, and in no other light than a pledge or security, to ensure the fulfilment of a pre-existing contract.—19 John. R. 60, *Randall vs. Van Vecten*.

2. But if the deed can be regarded as *the contract of warranty in itself*, then it is binding on Weeks as such, although void so far forth as relates to the security. And the suit should have been brought against Weeks on the contract of warranty in as much as the power of attorney from Weeks would authorise the defendant and Taylor to make such contract.

When the agent discloses his principal, and the power under which he acts, he can in no case be made personally liable.—2 Starkie's Ev. 1619.

But if the defendant is made liable on the ground that he transcended his authority, the remedy is by an action on the covenants in said deed.—7 Con. R. 220.—13 John. R. 307.

3. Neither the deed itself or taken in connection with any testimony in the case, tended in the least degree to show any *fraud* on the part of Foster. This action sounds in tort, and no acts or declarations of Taylor could make Foster liable. All that was said, or done in relation to the business was wholly between the plaintiff and Taylor. Foster was only called in and silently signed the deed which the plaintiff had got prepared.

Again. The plaintiff knew that the defendant could not without a power of attorney to that effect, execute a valid deed against Weeks. The power of attorney under which the defendant acted was recorded in the town clerk's office in St. Albans. Hence the plaintiff was as fully apprized as to the nature and extent of the defendant's agency as was the defendant himself. The plaintiff had precisely the same means to enable him to judge of the authority conferred by the power of attorney as the defendant had. The plaintiff and defendant might and probably did act under a mistake as to the power of attorney from Weeks, and if so, it would at the most make the defendant liable as in a case when the agent transcends his authority, but could in no wise make him liable on the ground of having practiced a fraud on the plaintiff.—17 John. R. 555-6, *Skinner vs. Dayton*, do. 559, 566, 567-8, do. 569.

4. It is contended that the court erred in excluding the testimony of Weeks. Had the suit been against Weeks or even against Foster and Taylor on the contract of warranty on the covenants in said deed, then there might have been some propriety in excluding

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such evidence as was offered unless "*followed up with evidence tending to prove that the plaintiff obtained the mortgage by means of any false account of the previous understanding between himself and Weeks.*"

But if it be true as the defendant offered to prove that the contract in relation to the demand against Bowker and Sealey was made between the plaintiff and Weeks himself, and that by the terms of said contract the plaintiff was to take *that demand* in part payment for the property sold to Weeks at his own risk, how is the plaintiff *defrauded* by the execution of the deed by the defendant (which although as against Weeks is void) but which purported to secure to the plaintiff the fulfilment of a contract of warranty which in fact was never entered into; neither was Clark entitled by the terms of the contract for the sale of the property to any guarantee of the collection of that demand.

Again. The mortgage deed, if palmed upon the plaintiff by *fraudulent* representations of the defendant, as it only effected the plaintiff's ultimate security, could not operate as an injury to the plaintiff, only in the event that Weeks should prove insolvent and unable to pay. Hence that fact should have been alleged and proved by the plaintiff, in order to entitle him to recover of defendant.

Lastly. It appears from the papers referred to that the plaintiff prior to the commencement of this suit had parted with all his interest by an assignment of the mortgage deed, and all sums mentioned in the proviso to one Lewis M. Wharton: consequently he cannot maintain this action.

The opinion of the court was delivered by

PHELPS, J.—It seems to be well settled, that a person assuming to act as the agent of another, without authority from his supposed principal, becomes personally liable. And it has been often held, that he may be treated as a principal party to the contract, and made responsible as such.

There are cases however, in which from the nature of the transaction, this remedy would be unavailable to the party injured. So in this case, if the defendant is treated as a principal in the contract, yet, the object of the contract being to create a security upon the real estate of Weeks, the supposed principal, no redress in this way could be had. The rule therefore would not aid the defective security; for if Foster made the mortgage as principal, it would not bind the land of Weeks.

The plaintiff has therefore resorted to his action on the case, counting upon the deceit. There is no doubt, that assuming to act as the agent of another, without authority for that purpose, is, generally speaking, fraudulent in itself. If the party represents that he has authority, knowing that he has not, it is morally as well as legally fraudulent. In the eye of the law, the assuming to act is equivalent to such a representation, and if the party have no authority, and the other party contract with him supposing that he has such authority, the effect is fraudulent. And where the case does not admit of a remedy by enforcing the contract against the supposed agent, as in effect the principal, the party is necessarily driven to his action for the deceit.

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The only serious question which can arise, is as to the burthen of proof. But we are of opinion, that assuming to act as agent in such case is *prima facie* fraudulent—that the plaintiff need show no more than such an assumption without competent authority, and that the *onus probandi* lies on the defendant to rebut the presumption of fraud.

It is true however, that fraud must be shown, in order to sustain this action. Where therefore the agent discloses his authority, and the parties are misled by a mutual misapprehension of the law as to the extent of that agency, an action for deceit most clearly would not lie.

It is on this principal, that persons acting as public agents are not personally bound if they transcend their authority. And so in this case, had the power of attorney been exhibited to the plaintiff, I for one, should have held it a mistake in point of law as to the effect of that instrument. But the case does not disclose that the plaintiff was made acquainted with the tenor of that instrument, or had the means of judging of the extent of the authority conferred by it. The case falls within the general rule above laid down, and the presumption of law is, that the plaintiff relied upon the representations of the defendant. The recording the power was no legal notice to the plaintiff of its contents. It became, when recorded, in connexion with the deed executed under it, evidence of title, so far as it went, of which a subsequent purchaser or attaching creditor would be presumed to have notice. But as mere evidence of a personal agency, as between these parties, there was no necessity for recording it, until something had been done under it, and the plaintiff cannot be supposed to look to the town record for evidence of its purport.

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As to the evidence of Weeks, which was offered and rejected, it is impossible to conceive, how it can be brought to bear on this controversy. His testimony merely went to show that he made no contract to guarantee the note. The papers in the case show conclusively that the defendant did subsequently make such a contract, professing to have authority for that purpose, and the complaint is, that his profession was false. The testimony of Weeks therefore if received would not vary the case.

Judgment affirmed.

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JULIAS H. RICE vs. J. and A. CLARK.

The court have no power, without the consent of the parties, to enlarge a rule of reference.

This cause being referred at a previous term of the county court by a written agreement of reference and the referees having failed to make report at the present term, the defendant now moved that the cause stand for trial in court, contending that the failure of the referees to make report at the present term operated in law to terminate their powers. But the court decided that by force of the agreement the powers of the referees remained, and no sufficient reason being shown to induce the court to discharge them, the cause was ordered to stand for a report at the next term. To which decision the defendants excepted. Exceptions allowed and certified.

*Smalley and Adams and Brown for defendants.*—This cause was referred by the order of court and agreement of parties agreeable to 79th section of the judiciary act. That act after providing for the return and acceptance of the referees goes on to say "if such report shall not be allowed and accepted, or if no report be made as aforesaid, the parties may again refer the cause, or the same shall be open for trial at law as though the same had not been referred.

There is no doubt as to the construction of this act in ordinary cases. If no report is made at the term to which the report is to be made then the cause must stand open for trial at law unless the parties at the time otherwise agree. The court have no power further to continue the cause for the report of the referees. The rule to referees can only be enlarged by agreement of parties.



This construction has uniformly been given to the statute, and the universal practice has gone upon that ground, which is undoubtedly the true one.

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But the case states that by the force of the agreement therein referred to, the powers of the referees remained.

It is contended that nothing contained in the agreement warrants such a construction. It is a simple agreement to refer the cause with other matters therein specified, without any contract to extend the time of trial and report. No words are used to that effect, nor any from which such a construction can be drawn.

The parties are presumed to have made their contract with a view to the existing laws, and the agreement must be construed upon that presumption.

But it is contended that an express agreement that the rule should be enlarged from term to term, would not alter the case. Even then the party might withhold his assent to the enlargement of the rule, and the court would be bound to dismiss the referees. The court might sustain an action on such a contract, and give to the party injured his damages, but have no power to enforce a specific performance. The agreement of parties may be the foundation for the exercise of the legal powers of the court, but can neither enlarge, or restrain, its legitimate authority.

That statute says if no report is made, the parties may again refer the cause, or it *shall* be open for trial. The continuance of the rule must therefore depend upon the present not the past agreement of the parties.

*N. L. Whitmore and Foster for plaintiff.*—The submission signed by the parties does not limit the time in which the referees should report ; but unconditionally refers the cause to be heard, tried and determined by the referees, and report thereof to be made to the county court. And by order of court the cause is referred agreeably to the agreement of the parties.

A submission by rule of court is irrevocable, so much so that the plaintiff, unless the rule is discharged or has expired by its own limitation, without being executed, cannot discontinue the action or become non-suit without the consent of the defendant.—7 East. 608.—12 Mass. 47.—2 Vt. R. 493.—Stat. p. 81.

The most favourable construction for the defendants would be, that the referees were bound to report within a reasonable time. And what shall be considered reasonable time must depend upon the circumstances of each particular case, to be decided by the court granting the rule ; from which decision there can be no appeal.

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The denial of the defendant's motion to discharge the rule, or dismiss the referees was the mere exercise of the discretionary powers of the county court over which this court can have no control.—2 Vt. R. 498.

The denial of the defendant's motion to discharge the rule was founded, first, on the construction given to the submission; secondly the delays of the referees in making a report arose from the continuance had before the referees at the request of defendants; and thirdly the defendants had consented to proceed with the trial before the referees under the rule, by having the cause on their own motion postponed for trial to the 8th day of June following the April term of the county court in which the motion to discharge the referees was made.

The statute, page 81, does not make it necessary for referees to report at the first term after the cause is referred. It provides that the referees shall make report to the court, which report shall be allowed and accepted unless sufficient cause be shown to the contrary. "But if such report shall not be allowed and accepted, or no report be made, the parties may again refer the cause, or the same shall be open for trial the same as though the cause had never been referred." This was intended to provide for cases where the referees refused to act again, so that no report could be made, or where the report should be set aside.

But the authority of the referees does not cease on the coming in of their report, as the report is frequently recommitted to them by order of court.—3 Vt. R. 537.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The attention of the court has been confined to a single question. It appears that these parties agreed to submit their controversies to reference, that a rule was entered into probably at the April term of the county court in 1834. The parties had previously agreed to submit the matters to a reference and were to pay the stipulated damages of \$500 if either neglected or refused. It is obvious that it was optional with each, whether they were to enter into this rule. They might have refused, and paid the stipulated damages. The court could not have enforced the reference, under the agreement. But this rule was entered into, and was enlarged from September term 1834, to April term 1835, before which term the parties and referees met and a continuance was granted by the referees to a period beyond the next

term of the court. The powers of the referees were limited to render their report to the next term which was in April. It would therefore need the action of the court, either with or without the consent of the parties (if they would act without such consent,) to enlarge the rule so as to continue the powers of the referees to the time to which they adjourned. Nothing therefore can be argued in favor of the proceedings of the county court in this case from the continuance thus granted. It may argue a degree of unfairness, or impropriety on the part of the defendant thus to obtain this continuance and then object to the enlarging the rule. It appears that the defendant at the April term did object to the enlargement of the rule and contended that the failure of the referees to make report at that term, operated in law to terminate their authority in the case. But the court determined that by force of the agreement the powers of the referees remained, and ordered the cause to stand for a report at the then next term. The question now is whether the court had any such power.

No power is given by statute to the court to order a reference. The submission was not made by order of court; but by agreement of parties. The rule in all cases of reference must by statute be made returnable to some term of the court; whether to the next, or whether it may be made returnable to a term beyond the next is not now to be decided. The rule when made determines the extent of the powers of the referees. The court cannot appoint the referees except by an agreement of the parties, nor make the rule returnable at a different term. Every enlargement of the rule is in effect a new reference and requires the same assent of the parties as is required to make the submission in the first instance. The statute is express and peremptory that if no report is made, the parties may again refer the cause, or it shall stand open for trial at law; but does not say that the court may again refer or enlarge the rule. Now although it may be and probably is true here as in Massachusetts, that after a rule of reference is entered into, the party cannot revoke the submission or suffer a non-suit until the term for making the report has expired; it by no means follows that the party is compelled to submit to a new reference; if from any cause he becomes dissatisfied, and prefers a trial at law. The agreement which was entered into by these parties in the first instance was not one which the court was either to examine or enforce. Notwithstanding the agreement, if either withheld their consent, the court could have made no rule, nor could they enlarge or continue it contrary to the wishes of the

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parties or either of them declared in court. The uniform construction of the statute in this state has been in conformity to the views here expressed. The court have exercised no control over a reference without the consent of the parties.

When the referees have complied with the authority given them and made a report, the courts have sometimes recommitted the same for amendment; but this is only for the purpose of having them do what they intended to do; but never was considered as giving them any new powers, or extending their powers, or authorising any farther hearing of the parties. The report after it is returned, may remain with the court for several terms, for the purpose of determining whether the same shall be accepted; but the referees can do nothing further when the rule expires by the time limited therein for making the report.

I am aware of the decision in Massachusetts and a still stronger one can be found in some of the earlier reports, where the court on the ground of their practice, enlarged a rule without consent, treating reports of referees as we do reports of auditors. A case of this kind was once presented to the supreme court on a question in relation to the powers of the court to enlarge a rule. The authority however was not considered as applicable to referees in this state and the decision in relation to the power of the court was such as we now make.

The case to which we were referred found in the 9 Wendell 480, *Bloor vs. Potter et al.* cannot be considered as any authority in this state. In New York the courts on motion and affidavit that a cause would require the examination of a long account may order a reference, and over such reference they exercise a control; but when a cause has been referred by consent they disclaim any authority over referees chosen by consent. Believing that the court had no power against the consent of the parties to extend the rule and order the cause to stand for a report at a subsequent term.

The judgment of the county court must be reversed and the cause remanded to county court for trial if any issues of fact are formed or returned here until the pleadings are closed,

## JULIUS H. RICE vs. ASHLEY CLARK.

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If one intrusted with property for a particular use, which becomes impracticable, lend the property to another who had knowledge of the facts, this is in both a conversion of the property.

If a person intrusted with property for a particular use be guilty of any abuse of the property in that use, he is not on that account liable to an action of trover.

This was an action of trover for an anchor.—Plea, the general issue.

On the trial in the county court the plaintiff proved that in the fall of 1832, one Ephraim Blodget, was sailing a boat of the plaintiff's, on board of which the anchor in question was used, being at that time at the Isle La Mott. The defendant applied to Blodget to borrow the anchor for one Sax of Chazy, telling Blodget that he had borrowed an anchor of Sax, which was on board of his boat then absent at Swanton, and that said Sax had sent for his anchor by one Peters who was then present, and that the defendant wished to borrow plaintiff's anchor for Sax to use, till defendant's boat returned from Swanton. Blodget told the defendant he might take it and return it to the plaintiff. The defendant took the anchor and let Sax have it to use. In the month of February following the plaintiff sent Blodget to the Isle La Mott to his boat which had been there wrecked just before the anchor was lent, and also authorized Blodget to sell the anchor to the defendant, or to call on the defendant to return the anchor. Blodget applied to the defendant to buy the anchor which defendant declined doing and informed Blodget that the anchor was at Sax in Chazy. Blodget then told the defendant that the plaintiff wished him to return the anchor. In the summer following the defendant being at Swanton the plaintiff also requested the defendant to return the anchor. It also appeared that in the spring of A. D. 1833 said anchor was seen at Chazy and at Port Kent, both flukes then being broken off, and that the anchor had never been returned to the plaintiff. The court decided that this evidence did not tend to prove a conversion of the anchor by the defendant, and directed a verdict for the defendant.

To which decision the plaintiff excepted. Exceptions allowed and certified.

*N. S. Whittemore and Foster for plaintiff.*

*S. S. Brown for defendant.*

The opinion of the court was delivered by  
REDFIELD, J.—The only question in this case is, whether the

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testimony given had any tendency to show a conversion of the property by the defendant. It is very well settled that a demand and refusal, when the defendant has it not in his power to deliver the property is no evidence of conversion.—*Smith vs. Young*, 1 Camp. 439. In the case referred to the deed which was the subject of the suit had been by defendant put into the hands of an attorney without authority, and the attorney claimed to hold it by a lien, created in this way :—Whenever the plaintiff in an action of trover relies upon showing a demand and refusal as evidence of a conversion, he must always accompany it by showing the property in the possession and power of the defendant at the time of the demand.—3 Stark. Ev. 1497.—Bull. N. P. 44.—2 Salk. 441. In this case it was not attempted to show that the defendant had the anchor in possession at the time of the demand.—2 Saund. R. 47, e.f. and notes.

But it is observable that this anchor belonged to plaintiff's boat, which had been wrecked on the lake, of which one Blodget was master. The defendant received the anchor of Blodget, saying at the same time that he wished it for one Sax at Chazy N. Y. The anchor was carried to Sax, and by him put to use and in the use much damaged. The only question here is, whether Blodget had authority, as master of the boat, to lend the anchor. And we have no hesitation in saying he had not. After the wreck of the boat, it was his duty as master to secure the fragments of the wreck and notify the owner, but he had no authority to sell, much less to lend or rent any portion of the tackle or boat. His agency then expired. If he did lend or sell any part of the boat without permission from the owner it was a conversion of the property, and equally a conversion in the defendant who, with a full knowledge of all the facts, hired the anchor of one who had no authority to make such a contract. Taking it under these circumstances is the same as if he had taken it by way of trespass, and he is clearly liable in trover unless he can show to the satisfaction of a jury, that the plaintiff either gave Blodget permission to lend, or subsequently consented to the loan. There was some testimony in the case in some degree tending to show that the plaintiff gave the defendant to understand by his conduct, that he consented to the contract made by Blodget. But this is a question of fact which should have been submitted to the jury.—2 Stark. Ev. 1493, — vs. *Hoy*.—4 Term R. 260.—2 Saund. R. 47, f. n. k.—2 Camp. 335, *Wilkinson vs. King*.—2 Stark. 311.—1 Cowen. 322, *Lockwood vs. Bull*.

Had the defendant proved authority in Blodget, or plaintiffs' subsequent assent to the contract, he would then have become a bailor of the goods for use, and not liable in trover for any abuse of the chattel in the particular use for which it was tried. The plaintiff's remedy, if any must have been lost.—3 Stark. Ev. 1493.—2 Saund. R. 47, e. f.

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The judgment of the county court is reversed and a new trial granted.

### ANDREW RUBLEE vs. JASPER CHAFFEE *et al.*

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If the defendant in a suit in chancery, brought to foreclose a mortgage, appears, claims that there is usury in the sum secured by the condition, has the same stricken out by the master in his report of the sum due, a decree passes for the sum actually due, and the orator takes possession of the premises mortgaged, he cannot maintain an action of ejectment against the orator in the bill, or those claiming under him, on the ground that the mortgage was void on account of the usury.

This was ejectment for land in Berkshire. The plaintiff having proved his possession and actual improvement of the land sued for, commencing about thirty years ago and continued by him, till within two or three years past, and having also proved the defendants, Chaffee and Goff, in possession at and previous to the commencement of the suit, and having given evidence tending to show that they then held as tenants under the defendant Childs, Chaffee being the immediate tenant and Goff holding under him, rested his case. The defendants read in evidence a mortgage deed of the premises from the plaintiff to Seneca Page, acknowledged and recorded May 1, 1828, conditioned for the payment of a promissory note for \$500 and another for \$178, together with said notes. They also gave in evidence the record and papers in a suit in chancery in this county in favor of Seneca Page against the plaintiff showing a foreclosure of said mortgage at the January term of said court 1831. They also offered in evidence a copy of a deed certified from the record from Page to the defendant Childs, dated Feb. 23d 1833 to which the plaintiff objected on the ground that the original deed should be presented, and said copy was therefore rejected. The defendants then offered to read in evidence a deed of the premises from said Seneca Page to the defendant Chaffee, dated October 8th 1834 to which the plaintiff objected, because it was executed after the suit was commenced ;

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but the court overruled the objection and admitted the deed. The plaintiff introduced evidence tending to prove that the mortgage and notes were given for a pre-existing debt of the plaintiffs' son for which the plaintiff was holden as surety, and that at the time of their execution, it was required by Page and agreed to by plaintiff and son that six per cent interest on the amount of said notes, for the time they had to run over and above the interest reserved on them should be paid to said Page in advance, and that the same was accordingly paid by the plaintiff or his son. The plaintiff contended that by reason of the usury aforesaid, if the jury should find the same, said mortgage deed and notes were inoperative and void—and that the plaintiff was entitled to recover back the land notwithstanding said foreclosure in chancery, for that the question of usury did not appear to have been adjudicated in that suit; but the court decided that the foreclosure of said mortgage and possession taken under it were to be regarded, for the purpose of this action as a payment of the notes and that the plaintiff could not now avail himself of the usury alleged, to defeat the title of the defendants. A verdict and judgment accordingly passed for the defendants; to which decision the plaintiff excepted. Exceptions allowed, and the cause was passed to the supreme court for revision.

*Mr. Smith for plaintiff.*

*Messrs. Smalley and Adams for defendant.*

The opinion of the court was delivered by

WILLIAMS, Ch. J.—It appears that the defendant in this case is in possession of the premises demanded under Seneca Page to whom the plaintiff conveyed the same by deed of mortgage. The mortgage was foreclosed by a decree of the court of chancery in 1831.

The plaintiff now seeks to recover on his original title, and defeat the title of Seneca Page on the ground that the mortgage was void, as usurious, and this brings in question the effect of the decree in chancery. Rublee the present plaintiff appeared in the suit in chancery, and was heard on the decree.

The object of a bill of foreclosure is to extinguish the equitable right of a mortgagor and to obtain a satisfaction of the debt secured by the mortgage. It is competent for the defendant to deny the legal right of the complainant, and to avoid the security or mortgage. After a decree of foreclosure a defendant in the suit in chancery should not be at liberty to impeach the legal title on any ground which would have been a good defence to the bill, brought to obtain the foreclosure. The bill is founded on a legal



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title, and as between the immediate parties to such bill and those claiming under them the decree must on this point be conclusive in the suit in chancery instituted by Seneca Page. Mr. Rublee the plaintiff in this suit appeared, consented to a decree that the bill should be taken as confessed, appeared before the master, exhibited his proof, as to the usury contained in the notes mentioned; the master made his report thereon, a decree was made by the court expunging from the debt what were claimed or proved to be usurious, and a decree of foreclosure made for the residue. The plaintiff in this suit who was defendant in the suit in chancery, has therefore had an opportunity to contest the legality of the mortgage, and waived it by consenting to the decree that the bill should be taken as confessed, has claimed and had the benefit of having the usurious part of the debt expunged, and for the sum he justly owed, a decree has passed against him. This subject in relation to the legal title of the plaintiff must be considered as being once adjudicated upon by a court of competent jurisdiction.

Furthermore, by neglecting to pay the mortgage, he has been foreclosed of his equity of redemption. The effect of that proceeding is, that the orator therein Mr. Page took the land in satisfaction of the debt ascertained to be due. The plaintiff therefore cannot disturb him or those who claim under him in the possession of the land, which he obtained by virtue of, and holds under the decree. To permit this would render the proceedings to the bill in chancery nugatory and useless, as it would neither extinguish the legal, or equitable right of Mr. Rublee if he can again contest, the validity of the mortgage and the validity of the notes secured in the condition, notwithstanding the whole subject has once been before a court of competent jurisdiction. It appears by the master's report that Mr. Rublee was justly indebted to Mr. Page before executing the mortgage in a sum of money for which Page might have maintained an action, notwithstanding the security by mortgage was void. Mr. Page was by the plaintiff permitted to obtain a decree which with the possession under it, is declared to be a satisfaction of his whole debts due before as well as by the mortgage. The court consider the plaintiff is precluded from attempting to set aside the mortgage on the ground of usury.

The judgment of the county court must therefore be affirmed.

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SOLOMON COLONY vs. JACOB MAECK.

A recovery may be had on a recognizance, entered into in court for the prosecution of a suit there pending &c., although the suit may have been dismissed for want of jurisdiction, if cost was taxed for the defendant in the suit agreeably to the provisions of the statute.

The court had jurisdiction of the suit for the purpose of taking such recognizance, also of rendering judgment on the plea to their jurisdiction, and of rendering judgment for cost.

This was an action of debt on recognizance.—Pleas, *nul tiel* record, and pleas in bar that the court before whom said recognizance was entered into had not jurisdiction of the subject matter of the suit. The plaintiff traversed the pleas of *nul tiel* record; and demurred the pleas in bar.

The court decided on inspection of the record that there was such a record, and the defendant's pleas in bar were insufficient. Whereupon judgment was rendered for plaintiff. To the decision of the court upon the sufficiency of the pleas in bar, the defendant excepted. Exception allowed and the cause passed to this court for revision. A further statement of the case is comprized in the opinion of the court.

*Mr. Maeck pro se.*—The defendant insists that the action cannot be sustained on the ground that the county court having no jurisdiction over the suit had no authority to take a binding recognizance.

Costs were not allowed at common law, they are of statute creation, and from the earliest period of their allowance to the present day it has been held an indispensable requisite that the court should have jurisdiction over the subject matter of the suit.—2 Mass. R. 207.—12 do. 370. At common law then the case is clearly with the defendant.

But the defendant rests his right of recovery on the act of 1830. The statute confers no power on the court to take a recognizance. *The whole power conferred is to tax costs and issue execution.* To go beyond the power given by the statute is assuming jurisdiction not warranted by the statute. It will be observed that the statute here confers a new right on the party, to wit, to tax costs and have his execution for them, a new jurisdiction in the court, to wit, to tax the costs and issue execution for them, and that the power can be fully enjoyed and the jurisdiction fully exercised to the extent of the statute without assuming the power of taking a recognizance. A proper application of the principles laid down in the following cases will put the matter beyond question.

In 6 Mass. 44, the court held "it was a rule founded in sound

reason that where a new statute gives a new power and the means of executing it, those who claim the power can execute it no other way.—See also, 12 Mod. 104.—5 Mass. 515.—2 Sid. 63.—Strange 25.

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But plaintiff insists that as the legislature have given the court power to tax costs they have impliedly given them power to take recognizances to secure them. But there is a broad distinction between implying those necessary powers to carry into execution an express power given by the law, and implying all those discretionary powers to render it in the opinion of the judge the most effectual and available. The first are legitimate powers, the second illegitimate. Costs can be taxed and execution issue for them without any recognizance. The legislature have fully expressed what and all they did intend and the court cannot vary.

It cannot be contended that the court have power to take any and all recognizances and that they are binding. The recognizances spoken of at a common law were either for the purpose of giving precedence in payment, to serve as evidence and to operate as liens. In all those cases a precedent debt, duty &c. existed on the part of the recognizer. They could not be taken when the right to enforce them depended on a contingency.

*H. R. Beardsley for plaintiff.*—Judgment having been rendered in the suit, James Thompson against the plaintiff that the court had not jurisdiction of the subject matter, the question now to be considered is whether the present defendant as bail can be 'holden to respond the plaintiff's costs in that suit.

It is unnecessary to examine the question on common law principles, for we consider the question as set at rest by legislative enactment. The act passed Nov. 5, 1830, declares "that in all actions which are or shall hereafter be pending before any court in this state and judgment shall be rendered, that such court shall proceed to tax costs for the party in whose favor such judgment shall be rendered and issue execution therefor." This act requiring the court to tax costs in such cases necessarily involves and confers the power of taking security for costs. Otherwise the act would be wholly nugatory.

The opinion of the court was delivered by  
WILLIAMS, Ch. J.—This is an action of debt on a recognizance, entered into by the defendant in the county court, to prosecute a suit there pending, in favor of one Thompson against Colony the present plaintiff, and to pay all costs in case of failure. The suit

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of Thompson against Colony was originally commenced before a justice of the peace, a judgment was rendered by the justice in favor of Thompson, Colony appealed to the county court, and inasmuch as the matter in demand was over one hundred dollars, the county court dismissed the suit and taxed costs in favor of Colony against Thompson which have not been paid.

A recovery in this suit is resisted, on the ground that the suit of Thompson against Colony not being within the jurisdiction of a justice, nor within the appellate jurisdiction of the county court, the county court had no authority to take the recognizance, but the only remedy of the present plaintiff is by his execution against Thompson.

Of the authority of the court to take such recognizance, we have no doubt. By the general statute, every plaintiff, on praying out a writ, is required to give security to the defendant, by way of recognizance, that he will prosecute the suit to effect. The court, before whom the suit is depending, where either the surety or the sum of the recognizance is insufficient to respond the costs, may order bail to be put in for that purpose. It is incident to the power of the court to take a recognizance. Wherever the court can tax costs, they may, by their general power under the statute, take a recognizance to secure the payment of those costs.

For many purposes the court had jurisdiction of the cause between the parties, although the recent want of jurisdiction may have been a defence to the suit, or preclude a final judgment on the merits of the action. The action was regularly before them for the purpose of adjudicating on any plea denying the jurisdiction. While the suit was pending, and before it was decided, the defendant might have been surrendered and ordered into custody in discharge of his bail. The court had jurisdiction for the purpose of taxing and rendering judgment for costs, and their judgment was subject to a writ of error, or a removal to the supreme court by exceptions, which is similar to a writ of error. It is equally clear to us that they had jurisdiction for the purpose of taking a recognizance to secure costs.

We do not consider that the power of the court to take a recognizance in cases similar to this was given by the statute of 1830. It existed before, and no writ could legally issue without a recognizance. Before that statute, whenever a cause was dismissed for want of jurisdiction in the court, costs usually were not allowed or taxed. Of course the recognizance became of no consequence. But when the legislature directed the court to tax costs for the de-

defendant upon dismissing a cause for want of jurisdiction, the same necessity existed for requiring a recognizance to respond the costs as in any other suit.

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In the case between Thompson and Colony the court had jurisdiction of the parties and of the action so as to render a judgment thereon for the cost ; the justice who issued the writ was required to take a recognizance to respond the costs ; and the court, while the action was pending before them, had, by the general statute and as incident to their powers, authority to take the recognizance on which this suit was brought, and the same must be effectual for the purpose for which it was taken. Having this view of the case the judgment of the county court, which was in favor of the plaintiff, must be affirmed.

#### FREMAN FASSETT vs. ADI VINCENT.

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A defendant in an action on book, may prove by his own oath, that he has delivered up to the plaintiff, in pursuance of an agreement between them, a note which he held against the plaintiff and another, in payment of the plaintiff's account.

This was an action on book account commenced before a magistrate and carried by appeal to the county court by whom it was referred to an auditor. At the trial before the auditor the defendant exhibited a charge on book against the plaintiff of \$10,04 cents, being the balance due on a note signed by the plaintiff and one Carr. The defendant offered his own oath to prove an agreement between himself and the plaintiff that the note in question should be applied upon the plaintiff's account, and also to prove that he had delivered said note to the plaintiff for the purpose of being so applied. But the auditor decided that the note in question was not a proper subject of book account, and that defendant's oath could not be admitted in support of it.

The county court sustained the decision of the auditor, whereupon the defendant excepted.

*Mr. J. J. Beardsley for plaintiff.*

*Mr. Stevens for defendant.*

The opinion of the court was delivered by  
WILLIAMS, Ch. J.—The defendant should have been admitted to prove by his own oath, that the note specified was to be applied

Same case reported to 73.

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in payment of the plaintiff's account, and that he had delivered it for that purpose to the plaintiff. The auditor was probably correct in his opinion that a note is not "a proper subject of book account," but erred in his application of that principle to the case in controversy. If the articles delivered by the plaintiff to the defendant, had been delivered and received in payment of a note no action on book could be sustained for those articles. If a note had been delivered up by the defendant to the plaintiff in payment of the book account of the plaintiff against him, and was so received, it was as proper for the parties to testify to such payment in the action on book, as it would to a payment in any other way or in any other article. The offer made by the defendant was to prove payment of the plaintiff's account in this way, and we think his testimony to that effect should have been received. The judgment of the county court must therefore be reversed, and the cause again referred to the same auditor to report at the next term.

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JOHN NASON and REUBEN EVARTS vs. BENJAMIN H. SMALLEY,  
CARTER H. HICKOCK and JOSEPH CLARK.

(In Chancery.)

If a judgment be rendered in pursuance of an agreement of the parties which directs a particular mode of satisfying it, equity will not permit it to be enforced in any way inconsistent with the agreement.

If one of two executors fraudulently consent to a judgment against both, the other executors will be relieved in equity—and if the judgment operates as a fraud upon the estate it will be enjoined absolutely.

And this although the judgment creditor was not privy to the fraud, if he be a trustee merely for the party to the fraudulent agreement,

In this case the judgment creditor was an administrator, and the judgment was rendered by agreement between one of the defendants, and a person interested in the estate represented by the plaintiff. *Held*, that if the other persons interested in the estate sought to enforce the judgment, they were subject to all equities arising out of the agreement, And inasmuch as the court of law did not examine the merits of the claim, the court of equity will do so, and if they find it not *equitable*—they will not permit it to be enforced either against the defendant who did not in fact assent to it nor against the estate which the defendants represent.

Under the Probate act of 1797, if lands are devised to A. and he is made executor jointly with B. and all debts due at the decease of the testator, together with all specific legacies are paid, A. holds the land as devisee and not as executor, and if a claim accrues afterwards the executor is not responsible.

The facts set forth in the bill were, substantially, these. In February 1810, Daniel Ryan died, possessed of a large real and

personal estate, and leaving a widow, and two children, viz : William N. Ryan and Harriet Ryan. The said Daniel made his will, in which, after sundry specific legacies, he bequeathed the residue of his estate to the said William N. and Harriet in different proportions, and appointing the orator John Nason, together with David Edmond, and John Curtiss, both since deceased, his executors. The will was duly proved, and the said John Nason, Edmund and Curtiss took upon themselves the execution of the will, and on that occasion gave bond to the probate court in the usual form, executed by themselves and William Nason as surety. In November 1810, W. Nason died, having made his will, in and by which he bequeathed certain legacies to his wife, and children, making the orator John Nason his residuary legatee and devisee, and appointing the orators his executors. Said William Nason was seized at the time of his decease of certain real estate in St. Albans, which he bequeathed to his wife for life, with remainder to said John Nason, and was also possessed of certain lease hold premises, the use of which he bequeathed to A. and M. L. for life, with remainder to the said John. The orators took upon themselves the execution of the will, the said John Nason being the acting executor. That in 1829, the widow of said William Nason died.

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In 1820 one Vincent, having a demand against John Nason, obtained a judgment and levied his execution of a part of the real estate of said William Nason, thus devised to said John, which was then subject to the life estate of the widow of said William, and having perfected his title thereto aliened the same.

In July 1820, the orator John Nason conveyed the residue of the home farm of the said William, subject to the life estate of the widow, to one Ainsworth, who subsequently mortgaged the same to one Miner, which mortgage came by assignment to the respondent Clark.

In March 1826 the said William N. Ryan, one of the residuary legatees of Daniel Ryan deceased, caused a suit to be instituted against the orators as executors of William Nason, in the name of the probate court, and counting upon the bond executed by said William Nason as surety for the said J. Nason, Curtiss, and Edmond, the executors of Daniel Ryan, and complaining of a devastavit by them of the estate of said Daniel Ryan. Pending this suit, William N. Ryan also deceased, leaving a minor son Daniel Ryan. The defendant Smalley was appointed administrator of William N. Ryan, and in that capacity appeared and was admitted to prosecute the suit. At the same time one Van Duxee, having

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married the widow of William N. Ryan, was duly appointed guardian of his infant son Daniel. And in the mean time Harriet the other child and residuary devisee of said Daniel Ryan, assigned all her interest in his estate to the other defendant Hickock.

In this state of things, the suit being still pending, an agreement under seal was entered into between the orator John Nason, who was only surviving executor of Daniel Ryan, and principal in the bond in suit, and also one of the executors of William Nason deceased, in which capacity he was defendant in the suit, on the one part, and Van Duzee, who in his character of guardian represented one of the residuary devisees of Daniel Ryan, on the other part, by which it was agreed, in substance, that judgment should be entered in said suit for \$5000 damages, and that the execution to be issued thereon should be levied of a certain portion of the home farm of the said William Nason, which was particularly described in the agreement, that the said John Nason should procure from the said Harriet Ryan a release of her interest in the tract so set off for the benefit of the representatives of said William N. Ryan, and that the residue of said execution should remain under the control of the said Nason, to be levied, if he so directed, of the residue of the said farm, in which case the same should be held in trust for such person or persons as the said Nason should appoint.

The bill states, that Everts, the other defendant in the suit at law, had no knowledge of this agreement until after the judgment was rendered. In pursuance of this agreement, a judgment was entered up against the orators, and in that suit, for \$5000 damages and costs. But Van Duzee refused to carry the agreement into effect, and directed Smalley the other defendant to pursue the judgment to full satisfaction. Smalley took out execution on the judgment against the estate of William Nason deceased, which was returned *nulla bona*. He therefore brought a *scire facias* to have execution against the orators, *de bonis propriis*. This suit being brought to trial, judgment was rendered against the orators for \$5100 damages and costs, to the decision of the court an exception was taken, and, in this state, the suit was pending when this bill was brought. The defendant Clark had in the meantime, brought ejectment on his mortgage, for the farm aforesaid, against the orator Nason, which was also pending when the bill was brought.

The bill also charges, that the orator Everts had no notice or knowledge of any liability of William Nason, on the bond aforesaid, or that any such claim existed against his estate, or that such



bond had been executed by him, until served with the writ in the aforesaid suit, that he took no part in the administration of the estate of Nason, but confided the same wholly to his associate John Nason, and that the orators have no effects of said Nason in their hands, but have fully administered, and that John Nason is wholly insolvent &c.

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The bill prays that the judgment against the orators be set aside, and all further proceedings in this suit enjoined; that an account be taken, and whatever claim the respondents Smalley and Hickock may have against the estate of Nason, may be satisfied out of the real estate of William Nason,—for further relief &c.

The answer of Smalley alleges, that William Nason left a large estate, which went into the hands of his executors, that they did not represent his estate insolvent, and have never settled their accounts. That the orators suffered the lease-hold estate to be forfeited by non-payment of rent, with a view to make a title in said John Nason, to the exclusion of creditors, and have suffered the estate to go to decay &c.

That he is prosecuting said suit, for the benefit of the creditors of W. N. Ryan, who died in debt, and denies all knowledge of the agreement between Van Duzee and the orator Nason, and all authority in Van Duzee to make it. But admits that judgment was rendered for \$5000 by consent and agreement of counsel in court, upon the proposition of the orator's counsel.

The bill was taken as confessed as against Hickock, and the answer of Clark, relating to his interest under the mortgage, is not necessary to be noticed.

The proof did not materially vary from the allegations of the bill and answer, which were found to be substantially true. The particulars in which the proof fell short of the allegations, so far as they are important are noticed in the opinion of the court.

*Beardsley for orators.*

*Smalley pro se.*

*A. G. Whittemore for Clark.*

The opinion of the court was delivered by

**PHELPS, J.**—This bill appears to have been drawn with a twofold purpose; its object being, first to set aside or enjoin perpetually the judgment at law upon the executors bond, and in this aspect, is a controversy between the orators and the defendant Smalley and Hickock, who represent the devisees of Daniel Ryan; and secondly, in case it fails in this object, to subject the es-

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tate of William Nason, which passed by devise to John Nason, and from him to the defendant Clark, to the payment of the debt or claim of the other defendant; and, in this respect, the controversy arises between the orators and the defendant Clark. The question with Clark depends altogether upon the decision of the question between the other parties to the suit; for, if it should be found, that the other defendants can not sustain their judgment, it becomes unnecessary to enquire, whether the estate can be followed, in the hands of Clark, and subjected to payment of the testators debts. On the other hand if the judgment can equitably be enforced, the question would then arise, whether the orator Everts is entitled to charge the estate in the hands of the purchaser, in order to exonerate himself.

The question whether the defendants are entitled to retain their judgment resolves itself into two distinct enquiries; the first growing out of the manner in which the judgment was obtained, and the second having reference to the intrinsic merits of their claim. Although the judgment may have been obtained in such a manner, that it ought not, in itself considered, to bind Everts, yet it would be idle to interfere, if the debt, thus in fact established, be just and equitable, or if the party must be left at liberty to prosecute anew, and a court of law would be compelled hereafter to render a like judgment.

There can be no doubt, that the judgment was entered in pursuance of the written agreement between Nason and Van Duzee. The defendant Smalley, although he repudiates the agreement, and denies all knowledge of it at the time, admits that the judgment was entered by agreement of counsel, and upon a proposition emanating from the counsel of Nason. No enquiry appears to have been made, as to the amount of the supposed divestavit, or the extent of the claimant's interest in it, but the judgment was for the penalty of the bond. This proceeding was wholly unaccountable, except upon the supposition of an agreement between the parties, and in the absence of all proof or even allegation of any other and different agreement, we must assume it to have been done in pursuance of the written agreement produced.

The question then turns upon the effect of this agreement, and the operation and effect of the judgment obtained in pursuance of it, viewing the transaction with the eye of a court of equity, and in reference to the power of that court to control the use which may be made of it.

The agreement in question may be viewed, either as a valid

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and unexceptionable agreement, which may be conscientiously enforced, or as fraudulent in its conception and purpose, and void, to a certain extent at least, both at law and in equity. Upon the first supposition, we must treat the transaction as binding in all its parts, at least upon the immediate parties to it, and we must treat the judgment as qualified, so far as concerns the use to be made of it, by the co-temporaneous agreement of the parties. It requires no argument to prove that Van Duzee can be permitted to enforce the judgment in no way inconsistent with his contract.

A question however is raised, whether the defendants are bound by that agreement; and on this point, it may be well to notice the relation of these parties. Smalley as administrator of the estate of W. N. Ryan must be regarded in this court as a mere trustee, and as recovering in this case for the benefit of the creditors of W. N. Ryan, if any, in the first instance, and for the heir in the next, which heir Van Duzee represents—Smalley is therefore the trustee, and Van Duzee represents one of the *cestui qui* trust, perhaps the only one. There is therefore a privity between them, the one representing the legal estate or interest, and the other the equitable, and ultimately beneficial interest. Hickock may be considered either as having no interest in the recovery, in which event he may be laid out of the case, or as having an equitable interest in the subject matter of the controversy, and standing in the same relation to Smalley as Van Duzee. In this view of the subject, Hickock and Van Duzee have a joint or common interest, as representing the two residuary legatees of Daniel Ryan, and are to be equally benefited by the recovery at law. The creditors of William N. Ryan, if any, sustain a similar relation to Smalley as their trustee and a similar relation to Van Duzee as being interested in the same trust. In these persons whom I have enumerated, rests the whole legal and equitable interest in the recovery, and they are the only persons whose rights are involved on the part of the defendants, or whose rights are entitled to consideration.

It is said that neither Smalley, nor the other *cestui qui* trust, are bound by this contract. So far as Smalley is a trustee for Van Duzee, he doubtless would be bound; for if Van Duzee is himself bound by the agreement, Smalley would not be permitted to pursue the judgment in violation of that agreement, for his, Van Duzee's, benefit. But with this exception, and so far as Smalley represented other equitable interests, it must be conceded that neither he, nor his *cestui qui* trust, would be bound. Granting however to these persons, the right to repudiate the contract, a serious

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question arises, whether they must not repudiate it in toto, and with all its consequences. Can they avail themselves of it, and of what is done under it, as being beneficially interested, without adopting it in toto? Can they derive an incidental, perhaps an inequitable advantage from it, and still reject those stipulations, upon the faith of which the judgment was submitted to? We think not. In our judgment the common principle of election applies, that if they adopt or reject, they must adopt or reject in toto. The judgment is a part of the fruits and consequences of the contract.

It was tendered upon certain terms and conditions—to be enforced only in a particular manner, and, if accepted, must be accepted upon those terms. In equity, it is not to be regarded as the act of the court, but as the act of the parties. Van Duzee acted in behalf of all interested, and they must adopt his acts as they are, or not at all. They are not indeed to be prejudiced by his acts, but unless they choose to adopt them, they must stand upon the original merits of their claim. If they seek an adventitious advantage from the judgment, they must take it with all restrictions. This agreement applies as well to those jointly interested with Van Duzee, as to Smalley, who, in equity, is their instrument, and has no right but theirs. In short the trustee is bound in equity by the act of the *cestui qui* trust, and those interested with him, if they adopt his acts, and if not, they can claim no benefit from them.

But this case deserves consideration in another aspect. There is a strong presumption, arising upon the case that the whole transaction was a fraudulent contrivance, to enable Nason to defeat the title of his own grantee, and to reclaim the land mortgaged to the defendant Clark, to the exclusion of that mortgage. At least, it is apparent that this was one object, and that the judgment was entered for a much larger sum than was due to the prosecutor, for this purpose.

What then is the effect of this fraudulent contrivance? A contract designedly in fraud of third persons, is as a general rule, good as between the parties to it. Still equity will not enforce such a contract while executory, nor, on the other hand, will it relieve the fraudulent party against his own contract. On this ground, if Nason alone had sought relief it would probably have been denied him, as equity would not relieve him from the consequences of his own fraudulent acts. But it is one of the great purposes of equity jurisdiction, to relieve the party who is the object of the fraud,

Although the immediate object, in this transaction, may have been to defraud the grantees of Nason, still the entering up of a judgment against Everts, to be in any event enforced against him, was as gross a fraud upon him as can well be conceived. On the face of the proceeding, it is apparent that a great share of that judgment was not due to the prosecutor, but was intended for the exclusive benefit of Nason. To permit the judgment to be enforced as against Everts, under such circumstances, would be to permit the principal to recover the debt out of his own surety; for Nason being the acting executor, and guilty of the devastavit, if one was committed, must be regarded as principal, and Everts his associate stands on the footing of a surety. Indeed it is worse, for as the supposed debt must be taken to be fictitious, it is no less than submitting to a fictitious judgment to be enforced against Everts for the benefit of Nason. Such is the transaction on the face of it. And it does not vary the case, if we suppose that the design in the outset was not to enforce the judgment against Everts, but simply to create a title to the land alluded to in the agreement. If the enforcing the judgment against Everts was an after thought, it is equally fraudulent in its nature and effect.

Everts therefore is entitled to relief as the party aggrieved, unless he be so far implicated in the fraudulent purpose, as to subject him to the vindictive rule of law, which denies relief to the fraudulent party. It does not however appear, that he had any notice of the proceeding, until long after it took place. The most that can be made out is, that his counsel in the suit at law had knowledge of the agreement, and it is insisted that this constructive notice is sufficient to preclude his claim for relief. But the counsel in the suit probably followed the directions of Nason, and under the circumstances, there is no very strong presumption that they consulted Everts on the subject. At all events, we think the presumption not sufficient to establish notice in fact, and mere constructive notice is not sufficient, so to implicate the party in the fraudulent and culpable design as to preclude him on that ground from ordinary equitable relief.

We are therefore of opinion, that the defendants can claim no advantage by reason of their judgment at law, but if that judgment be retained at all, it must be upon the original merit of their claim, and as a security for what may be equitably due.

With a view to this branch of the case, the bill has been referred to the master to take the account, and ascertain how far there are assets of William Nason in the hands of the orators. His re-

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port shows nothing in their hands, and if they have no assets, then there can be no equitable reason for keeping the judgment on foot.

It is insisted however that there are two grounds upon which the judgment may be left in force, viz :

1. That the real estate, devised by William Nason to John Nason, may be treated as asset in the hands of the executors.

2. That they have been guilty of a devastavit, in relation to the lease hold estate, forfeited for non payment of rent.

As to the first, we think it unnecessary to enquire, whether the creditors may pursue the estate in the hands of a *bona fide* purchaser, or how far a lien upon it may exist. The question here is, whether the lands are now to be treated as assets in the hands of these executors, and whether Everts is responsible for the value of those lands, under the circumstances of the case. Originally, without doubt, those lands were assets for the payment of debts, and were subject to the disposal of the executors for that purpose. They were devised to the orator John Nason, who was one of the executors, subject however to the contingency of being required for the payment of debts, and the question is, how long they are to be considered as held in trust by the executors, and when Nason alone would become seized in his right as devisee. This question is important, as whenever the period should arrive, when Nason might assert his right as devisee to aliene the land absolutely, the power of the executors as such must necessarily cease, and their trust, with its corresponding liability, must be determined.

At common law, no question of this kind would arise. The real estate, not being assets in the hands of the executor, but the heir being liable by reason of the inheritance, he of course was liable in the outset, to the extent of the inheritance, and the only question which could arise was, as to the right of the creditor to follow the inheritance, in the hands of strangers. Under our system, land being assets in the hands of the executor, and the principle of inheritance and the power of devising being recognized, various questions have arisen, as to the appropriate remedy, in given cases. In the first instance, there is a remedy against the heir or devisee, and lastly a supposed remedy, by way of lien on the estate in the hands of the purchaser.

The probate act of 1797, by which this case was governed, was defective, in not designating precisely at what period the liability of the executor or administrator should cease, and that of the heir or devisee should accrue ; a defect which is supplied by the act of 1821, which requires a decree of the probate court to divest the

right of the executor, or administrator, and to vest the estate in the heir or devisee ; and at this period, the corresponding liability to creditors is transferred. In this omission in the old act, the difficulty of this case originates. On the one hand, it seems improper that the right of the heir or devisee should be suspended, so long as there is a possibility that claims against the estate should arise, and, on the other hand, there is no good reason for holding the executor or administrator responsible for the supervenient claims, after the estate has gone to the heir or devisee, and been by him aliened. With respect to claims susceptible of liquidation at the time of the testator's decease, there is no hardship in holding the executor responsible for their payment, especially as he may compel the holders to present them within a limited period, or submit to be barred. But with respect to claims, like the one in question, which may originate at an indefinite period afterwards, it is difficult to lay down a general rule sufficiently satisfactory and explicit.

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We know of no better rule on this point, than this, whenever all debts due from the testator, at the time of his decease, with charges of administration, &c. and all specific legacies shall have been paid then the estate is to be considered as vesting absolutely, by force of the devise, and the power of the executor as such ceases. Unless, indeed, he have notice, in the mean time, of claims subsequently accruing, which renders it his duty to retain his authority over the assets. At all events, if the devisee alien the estate after this period, without any notice to the executors of such supervenient claims, there is no doubt, that the alienation is valid, so far at least as to sustain the plea of *plene administravit*.

In this case, the testator died in 1810. All claims against his estate, (this only excepted) must be presumed, at this day, to be satisfied. This claim was put forth, for the first time in 1826, sixteen years after the decease of Nason. Can it be required of Everts to maintain his authority over the estate for this period, and shall the right of Nason, as residuary devisee, to dispose of the estate, be thus suspended ?

In our opinion, this would extend the liability of the executor too far. When Nason conveyed the estate in 1820, we see not how Everts could resist the alienation ; and if so, we can discover no reason why the land should now be considered assets in his hands, or he as guilty of a *devastavit*.

The defendants must be left to their remedy against Nason, as devisee or *haeres factus*, or, if they can establish their right so to do, to pursue their remedy against the land in the hands of the purchaser.

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As to the supposed devastavit in relation to the leasehold estate, the point is already disposed of. The forfeiture of the estate took place long after the period, when we consider Everts to have been discharged from all responsibility in regard to the land, and the payment or non payment of the rents was a matter which concerned Nason alone.

We think therefore that there is, in equity, no liability on the part of Everts to sustain this judgment—that the entering 'up of the judgment was a fraud upon him—in short, that the judgment can not, *proprio vigore*, bind him, nor can it be permitted to stand as a security, there being no liability to be enforced. Whether the judgment ought not to stand as against Nason, is a more serious question.

Viewing the question with reference to the immediate parties to it, viz, Nason and Van Duzee, and without reference to the rights of third persons, it would seem that the judgment ought not to be retained except upon the footing of the contract.

Still Nason is undoubtedly liable, to some extent, and in some way, as the executor of Ryan; and the judgment might stand against him, as a security for the liability. Were he the only person whose rights are implicated, there would perhaps be no reasonable objection to suffering it to stand for that purpose. But if it remain, it remains a judgment against him as executor of William Nason. What consequences direct and immediate, or remote and contingent, might flow from this judgment, it is impossible at this time fully to anticipate. Whether it might not serve as the basis of a suit against his sureties as executor of William Nason, or a proceeding of some kind against that estate in the hands of other devisees, or *bona fide* purchasers, are questions which we are not prepared to answer.

The judgment was entered at random, and doubtless for a sum far exceeding what was due. Should it be permitted to remain in force, to serve as a basis for further proceedings, it is doubtful whether persons subsequently liable could be permitted at law to contest it, and thus the grossest injustice might be done.

The argument against relieving Nason is, that he seeks relief from his own fraudulent contract. But in this case the judgment is *de bonis testatoris*, and it is necessary to enjoin the judgment, in order to obviate the fraud, the consequences of which will otherwise fall upon the estate. If execution should issue upon that judgment, and be levied upon the lands in the hands of Clark as mortgagee, the question of lien would then arise, and, should the lien be es-



established, the defendant Clark would be without remedy at law, and the property would be taken from him, for a debt, which we are bound to consider as, to a great extent, fictitious.

The doubt on this point arises from the circumstance, that Nason is one of the orators. Had he been made a defendant, there can not be a doubt that the judgment would be enjoined, and we do not see, that his being made co-plaintiff debars the other parties from the relief, to which they are clearly entitled. Should we dismiss the bill, on this ground, the defendant Clark would doubtless become the orator, and, upon his application, the judgment must unavoidably be enjoined.

As to the defendant Clark, there is no ground for a decree against him. He was made defendant, and a temporary injunction granted upon his suit, with a view to a supposed lien upon the land in case the orator Everts was made liable in the suit at law; but, as the proceeding at law will be enjoined, there is no necessity of discussing that lien, or continuing the injunction upon Clark. That injunction is therefore dissolved, and Clark dismissed with his costs.

And the other defendants are perpetually enjoined from proceeding upon their judgment at law, either against the orators, or against the estate of W. Nason, or persons interested therein.

## GRAND ISLE COUNTY,

JANUARY TERM, 1836.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice*.

"	SAMUEL S. PHELPS,	} <i>Assistant Justices,</i>
"	JACOB COLLAMER,	
"	ISAAC F. REDFIELD,	

GRAND ISLE,  
January,  
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## JANE GRAVES vs. JOHN ADAMS.

A complaint for bastardy must be in writing and be signed and sworn to; but the complaint need not so state.

The complaint states that J. G. complains that the defendant did beget a child on one J. G. which is likely to be born a bastard &c., and then praying process, the same not being signed, was held insufficient.

This was a prosecution for bastardy. The complaint was as follows:

"To Calvin Fletcher one of the justices of the peace in and for the county of Grand Isle comes Jane Graves, a single woman, and on oath complains, informs and gives said justice to understand that on or about the last days of May or the first of June 1834, at South Hero aforesaid did beget a child on the body of one Jane Graves of South Hero aforesaid which said child when born will, unless prevented by a prior marriage, be a bastard. Whereupon the Said Jane Graves prays that a warrant may go," &c.

At the county court the defendant filed a motion to quash the complaint, order, warrant and all the proceedings, assigning the following reasons:

1. That said justice Fletcher hath returned to this court a paper, purporting to be the original complaint, warrant, &c. when the copies should have been returned.

2. That at the time of the service of said warrant upon this defendant, and at the time this defendant appeared before said justice and was recognized, together with his bail for his appearance at this court, the said complaint was not signed by said Jane Graves,

but that the same was signed by her after the arrest of this defendant, and after the recognizance aforesaid was taken by said justice.

3. Because there is no minute of the time, day, month, and year when said complaint was exhibited to said justice, made upon said complaint and signed officially by said justice.

4. Because it does not appear that said Jane Graves ever subscribed any oath to the truth of the facts charged in said complaint.

5. Because it does not appear from said complaint that the Jane Graves who preferred said complaint to said justice was the same Jane Graves who is alleged to have been begotten with child.

6. It does not appear from said complaint that said Jane Graves was a single woman at the time she is alleged to have been gotten with child, but only that she was a single woman, when she made the complaint.

7. It does not appear from said complaint that said Jane Graves at the time of the exhibition thereof, was with child by said defendant nor that she had previously been delivered of child.

8. Said complaint does not charge this defendant with having gotten the said Jane Graves with child and with being the father of said child.

The county court rendered judgment that said complaint and proceedings be quashed, it appearing that said complaint was not signed until after the arrest of the defendant and his entering his recognizance before the justice. To this decision of the county court exception was filed, and the case passed to this court.

*Argument for the defendant.*—This is a case of bastardy brought on the statute of Nov. 9, 1822, and unless that statute has been strictly complied with, the plaintiff can take none of the benefits and advantages given by it.

The statute makes it necessary that the complainant should be a single woman—and that such single woman must have been delivered of a bastard child, or must declare herself to be with child and that such child is likely to be born a bastard—and in either case such single woman must, in writing and on oath before any justice of the peace of the same county charge some person with having gotten her with child and being the father of such child.—See Rev. Stat. p. 366.

None of which requisitions are contained in the pretended complaint in question.

*Argument for the plaintiff.*—The proceedings in this case comes to this court in the form of exceptions to a motion to quash the

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proceedings on several grounds. And it is presumed the court will not sustain the motion for irregularities merely formal, which might have been the subject of amendment, or which do not effect the substantial merits of the complaint. The magistrate is made by the statute simply a ministerial officer; when the woman in writing and on oath, makes the charge, he must bind the person charged to the county court or commit him; and in short, he is regarded only as the medium through which the matter in controversy is conveyed to the tribunal appointed by law to adjudicate it. If the proceedings are defective in allegations absolutely requisite to constitute a statutory ground of proceeding, they must of course be quashed; but if they contain all that is essential and substantial, to quash them for informalities, for trifling defects &c. would contravene the obvious policy of the law, and expose proceedings of this kind, in a majority of cases to be defeated, and the party injured to commence *de novo*, at great expense and with no benefit to any one. As to the first objection the statute on which the complaint is founded, no where recognizes that the magistrate should send up the copies, instead of the original. The nature of the proceeding and the character in which he acts, seems to prescribe *a priori*, the exhibition of the original to the county court. Either course is well enough.

2. The fact on which this objection is founded is wholly gratuitous. The complaint seems to have been signed and served on the 8th October 1834. The intendment at law is that the proceedings were regular, if they so appear. Moreover, this was a summary proceeding, and the complaint with the service &c., are all presumed in law to be done at the same time; the *punctum temporis*, the precedence and subsequence of acts stated in records and presumed to be contemporaneous cannot be enquired into, because wholly immaterial.—3 Stark. Ev. 1043 and 1278.—1 Chit. Pl. 288-9. And furthermore the statute no where requires the complaint to be signed.

3. This objection is obviated by *Hall vs. Adams*, 1 Aik. R. 68, and the statutes there referred to.

4. The statute required plaintiff to "charge" defendant "in writing" and this was done—but not subscribe any oath. It required her to take an oath, and the magistrate certifies that she did so, in the usual form.

5. The plain language of the complaint, shows the identity of the person which the objection denies, beyond the possibility of cavil.

6. The complaint alleges that Jane Graves "a single woman" complains &c. The allegation does not limit her single blessedness to the time of making the complaint, but is descriptive of her condition in this respect, generally, and at a previous time. It is the intendment of law then, that she was single when the mischief happened, and if the fact were otherwise, and could have had any influence on defendants liability, it was matter of evidence. Besides, the statute does not require her to allege—as the defendant does—that she was a single woman when seduced; and the complaint follows the language of the statute exactly.

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7 and 8. The complaint alleges that "on or about the last days of May 1834" defendant "did beget a child upon the body of Jane Graves" which said child when born will be a bastard &c., and the complaint was made October 8th 1834. It is difficult to see how the pregnancy and the author of it could have been more clearly averred. The omission to aver that the defendant was "the father" is immaterial, since both forms of expression used in the statute are precisely equivalent, and that employed in the complaint conveys the idea fully.

It may be remarked that the proceedings in those bastard cases are treated in all respects like a civil suit, except that the process may be forthwith, and do not require that technical nicety that is required in criminal proceedings. The forms of proceeding adopted by the magistrate in this case have been used in this state more than thirty years without objection.

The opinion of the court was delivered by

COLLAMER, J.—The statute provides "that when any single woman shall be delivered of any bastard child, or shall declare herself to be with child, and that such child is likely to be born a bastard; and shall in either case, charge any person, in writing and on oath, before any justice of the peace of the same county, with having gotten her with child and being the father of such child, the said justice, on the application of such woman, shall issue his warrant," &c. It then goes on to provide that on the defendant's being brought before the justice he shall enter into a recognizance to appear before the county court and answer to said complaint, or be committed.

In the argument of this case much has been said by one of the plaintiff's counsel on the ground that inasmuch as this motion to quash was not interposed before the justice, it is cured or waived. This proceeding before the justice is copied from the English

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statute, in which the justice performs merely the part of a ministerial officer. No proceedings are had before him in a judicial capacity. He does not pass on the merits of the case. The whole proceeding before the justice is a mere proceeding to get a case before the county court; and therefore the whole must be there subject to every objection for irregularity, as the defendant has never waived these objections by proceeding to the merits of the case.

The statute clearly requires that complaint shall be made in writing on oath by the woman who is with child or who has been delivered, and that it shall charge the defendant with having gotten her with child and being the father of such child. It is here insisted that this complaint is not on oath. It is true that the complainant is not a competent certifying officer to the fact that she was sworn, and therefore, what is said in the complaint on that subject is useless; yet it does appear by the justice's certificate that she was in fact sworn to the complaint before the warrant issued, though the certificate of this fact was not made until afterwards.

The complaint must be in writing. This implies signing. It is not perhaps necessary it should be subscribed, but it must be signed, that is, it must be under the hand of the complainant. It must be signed by herself, or by some person for her by her authority. It seems this was never done until after the whole proceedings before the justice were closed. The woman must declare herself to be with child and charge some person with having gotten her with child and being the father of such child. This must be done in the complaint with certainty at least to a common intent. In this complaint the plaintiff comes, and calling herself a single woman she complains not that she is with child, nor that the defendant has gotten her with child, but she says that one John Adams did beget a child on *one* Jane Graves, and then without alleging or suggesting that she is the same person, or that the Jane Graves who has been begotten with child had any connexion with this prosecution, the plaintiff apparently without any authority, prays process to issue. In all the forms of pleading when the complainant or plaintiff uses the term *one* A. B. it implies some other third person, not before mentioned. It must be so taken unless otherwise explained in the count; which not being done here, the court must hold that the plaintiff cannot complain for the grievance of another person.

Judgment affirmed,

## ADDISON COUNTY,

JANUARY TERM, 1836.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

"	STEPHEN ROYCE,	} <i>Assistant Justices.</i>
"	SAMUEL S. PHELPS,	
"	ISAAC F. REDFIELD,	

## WARREN H. WEBSTER vs. SEYMOUR and JOSLIN.

ADDISON,  
January,  
1836.

A citizen of Vergennes liable to taxation by reason of his property does not acquire an exemption from taxation, or arrest for payment of taxes by enlisting into the army of the United States.

This was an action of assault and false imprisonment.—Plea, general issue, with a justification of the assault and imprisonment. Replication—That at the time of the assault and imprisonment, the plaintiff was a soldier or artificer in the United States service, and that his body could not be arrested or imprisoned, on any debt or contract for a less sum than twenty dollars. The plaintiff offered evidence tending to prove that he was on the first day of March 1833, regularly enlisted as a private soldier into the army of the United States for the term of five years, and was faithfully doing his duty therein at the time of his arrest and imprisonment, and that the debt or contract then held by said Seymour against him, was less than twenty dollars, and that he continued in the service of the United States, until the 20th day of November 1835, when he was lawfully discharged therefrom, and showing the court the acts of Congress of the United States, by which it is enacted, that no non-commissioned officer, musician, or private, shall be arrested, or subject to arrest, or be taken in execution for any debt under twenty dollars contracted before enlistment, nor for any debt contracted after enlistment. The defendant Seymour offered evidence tending to show, that at the annual March meeting holden at Vergennes, on the last Tuesday in March 1833, he was duly

*Appellant, A. J. Vergennes, 1832.*  
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chosen surveyor of highways for the eastern district in said Vergennes, that on the first day of May A. D. 1832, a town tax was assessed on the polls and ratable estate of the inhabitants of said district made up in the grand list of said Vergennes for the year 1832, by the common council of the city of Vergennes, on which appears the name of Warren M. Webster, assessed in the sum of sixty-six cents, the said Webster being a citizen of Vergennes and subject to taxation there, which rate bill was committed to said Seymour, to collect, and that afterwards in the month of July 1832, by virtue of a warrant annexed to said bill he committed the plaintiff to the jail in Vergennes for the non-payment of the tax. On the trial the court decided; that the acts of Congress aforesaid did not exempt any non-commissioned officer, artificer, private or musician in the army of the United States from arrest from any tax to be expended on the highways in this state, either over or under twenty dollars, when the same was made up on a list made by the proper authority before their enlistment, and the soldier being liable to taxation before enlistment, whether the tax was assessed before or after the said enlistment, that the words "debt or contracts" named in the said acts of Congress did not extend to taxes in this state: and directed a verdict to be entered for defendants.

To this opinion of the court the plaintiff excepted:

*E. D. Woodbridge for plaintiff.*—The point presented in this case is, whether a soldier in the army of the United States is liable to arrest and imprisonment by virtue of a warrant annexed to a rate or tax bill under the sum of twenty dollars assessed and laid after his enlistment.

The plaintiff first, contends that there is no distinction in fact, between the meaning of the word execution as used in the acts of Congress and the word warrant as used in our statute to be annexed to tax bills. The effect is the same. The execution commands the officer to take the goods, chattels, or lands of the debtor and for want thereof to take his body. Warrant annexed to a rate or tax bill commands the same.

2. To take either the statute aforesaid or the definition of the word warrant (so far at least as those to be annexed to rate or tax bills) and the word execution as given by Walker, they are literally the same, and by virtue of neither could the body of the plaintiff have been legally arrested or imprisoned.

3. The word *debt* and *tax* have in all particulars the same meaning. The word *debt* as defined by Walker means, that which one



man owes to another, that which any one is obliged to do or suffer. And the word tax as defined by the same author means, an impost, a tribute imposed, an excise, a tollage, charge &c. Debt is nothing more than an obligation entered into by the party himself with some other individual, by which he contracts to do certain things, and on failure of performance he subjects himself, by due course of law to the penalty of imprisonment; and tax is another word for the same thing—it is nothing more than a contract entered into by every individual on his becoming an inhabitant of any town or becoming a member of any society or corporation that he will pay his share of all taxes legally imposed by such town, society or corporation, and on failure thereof, that his property or body may be taken by due course of law in satisfaction of said tax. Therefore that a tax is nothing more or less in its nature than a debt or contract, is most certain.

*Assessor,  
January,  
1856.*

*Webster  
vs.  
Brymner &  
Jedlin.*

*P. C. Tucker for defendants.*—Two points were decided by the court in this case.

1. That the acts of Congress do not exempt any non-commissioned officer, artificer, private or musician in the army of the United States from arrest for any tax to be expended on the highways in this state, either over or under twenty dollars, where the sum was made up on a list made by the proper authority before their enlistment, and when the soldier was liable to taxation before enlistment, whether the tax was assessed before or after said enlistment.

2. That the words debt or contract, as used in the acts of Congress did not extend to taxes in this state.

The laws of the United States provide that no non-commissioned officer, musician or private shall be arrested or subject to arrest, for, or to be taken in execution for any debt under the sum of twenty dollars, contracted before enlistment, nor for any debt contracted after enlistment.

These clauses are not to be construed without any exceptions. Strictly speaking, every thing which one person owes to another is a debt, and even a trespass might be called so; because when the aggressor has been sued at law and a judgment has passed against him, that judgment would be "a debt." Would the soldier, then, be, by such a construction, exempt from the consequences of a trespass? We apprehend not. And although there is no decision upon the subject reported, we understand it has been so hol-

*Anderson,  
Assessors,  
1858.*

*Webster  
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Sergeant &  
Jolins.*

den at the county court in Chittenden county, while a judge of the supreme court presided.

The general object of the statutes of the United States on this subject appears to be very obvious. They offer an inducement for men to enlist, on the one hand, and a preventive to giving them a credit while they belong to the service, on the other. But we contend that they were never designed to extend to any thing that was not strictly a debt or contract. A tax is more properly a duty than a debt or contract, and is very peculiarly so when it is a highway tax which may be paid in labor.

A debt is defined to be "that which one man owes to another; that which any one is obliged to do or suffer". To contract generally means "to make a bargain, a compact." This implies an agreement, a union of minds, and may be contradistinguished from a tax by the latter not involving any idea either of a bargain or compact. A tax is said to be "an impost, a tribute imposed, an excise, a tallage." Neither of these suppose an agreement on the person taxed, unless it be the implied understanding of submission to the laws of the land; none of them can correctly be called contracts. All the statutes of the United States on this subject use the words "for any debt contracted." An impost, a tribute, an excise, a tallage, are neither of them "debts contracted." They might either be called the effect of the supreme power or authority of the country acting upon the citizen without his consent, and manifestly involve ideas altogether foreign and dissimilar to those understood by the words debt or contract.

The soldier in the present instance was liable to the tax before enlistment, and had been assessed for it by the proper authority. The officer was necessarily compelled to collect it upon his warrant or commit the plaintiff upon his refusal.

The opinion of the court was delivered by

PHILPS, J.—The point submitted for our decision is, whether the plaintiff was legally liable to arrest for the tax described in the case.

The question, how far persons attached to the army of the United States may be subjected to taxation in the particular district where they are stationed, and may in fact reside, is not, in its full extent, involved in the case. And whether the city of Vergennes can claim such persons; as may be attached to the Arsenal at that place, as residents, and subject to taxation by reason of their residence there, is not necessary in our opinion to be decided.

It would seem however, that upon common principles, they would not become liable to mere personal taxation, by reason of residence alone. Their residence must be referred to the military station, over which the United States exercise, by cession, exclusive jurisdiction, and so far as respects personal protection, they derive it rather from the government of the United States, with which they are thus connected, than from the government of the state in which they may be stationed temporarily, and under the immediate direction and control of the war department. It follows that they are not to be considered as becoming citizens of that place, to the purpose of taxation, as a necessary legal consequence of their location there.

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So far, however, as they may possess taxable property, situate within the jurisdiction of the city, the rule would seem to be different. As jurisdiction over property involves the power of taxing it, the power of enforcing the tax necessarily follows. If it be real estate, the point would hardly admit of a doubt, and if it be personal, it would be difficult to discover any distinction in point of principle, between the one and the other. Both are equally under the protection of the state, and for this protection the owner, whoever he may be, owes the corresponding obligation to the government which protects it.

This case however, depends upon other circumstances. The plaintiff was a citizen of Vergennes previous to his enlistment as a soldier. He had taxable property there, and a list which had been completed before his enlistment, upon which list the tax in question was assessed.

The precise question then, in this case is, not whether he become subject to taxation by reason of residence there as a soldier, but whether, by his enlistment, he was absolved from such liability, where it previously existed.

It has never been considered that becoming an enlisted soldier disfranchised the citizen. The right of suffrage has been uniformly asserted and sustained, in cases like the present, and the right of protection, in regard to property—in its fullest extent, has never for this reason, been questioned. As protection and taxation involve corresponding rights and duties, there is nothing in the nature of things which would exempt the soldier from the one, if it did not divest him of the other.

We must look therefore, for such exemption, if it exist, in some positive legislative enactment. No such exemption however is supposed to exist in the acts of Congress on this subject; but it is

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insisted, that there is a provision in those acts, by which the plaintiff was exempted from arrest for that cause. It must be conceded, that, if the plaintiff was subject to taxation in regard to his property, he was liable to be dealt with, in the same manner as others similarly subject, in the collection of the tax, unless he be can establish a personal privilege under the law of the United States.

Several acts of Congress exempt the soldier from arrest, under circumstances for any "debt or contract." These terms, it is insisted, embrace the present case. The enquiry then turns upon the import of these words. That this is not a case of contract must be conceded. Is the tax then a debt, within the meaning and to the purposes of this statute? In the most extensive sense of the term, every thing is a debt which is of absolute obligation, but, in its more limited sense, it imports only a particular kind of duty, and in this sense is substantially synonymous with contract. In this sense it is more generally used in statutes relating to the execution of process, and especially in those which are intended to mitigate the rigor of the common law, and to create certain privileges and exemptions in behalf of the debtor. It is a distinctive term, and has reference, in such cases, to a distinction between different classes of debtors, well founded in the nature of things, and which has an important bearing upon statutory provisions of this character. The common use of the term, therefore, in similar statutes, requires that it should be taken in its limited sense. There are other and most satisfactory reasons why we should so understand it is the case. If we extend it to every case, where a debt arises by force of a judgment, from whatever cause the duty may originate, we create an exemption in behalf of the soldier in all civil cases, even to the case of the most aggravated trespass,—an exemption, which could not consist with the safety of the citizen, in his person, or property.

We cannot believe that Congress so intended: nor that their purpose was, to turn loose upon the community, without responsibility to the laws or the civil magistrate, a class of men, prone from the nature of their vocation to violence and outrage, and a class of men, who in every age and country have been regarded with jealousy and distrusts.

Upon the whole, we are of opinion, that the plaintiff was legally subject to the tax in question, and was lawfully arrested upon the warrant, and the judgment of the county court is affirmed.

It may be proper to add, that we proceed upon the ground, that the plaintiff possessed property within the jurisdiction of the city.

upon which the tax in question was assessed. Had the case shown that he was assessed only for his poll, a different question would have arisen. As the right of personal taxation rests upon the duty of personal protection, it may well be argued, that the plaintiff, by his enlistment, was placed under the immediate protection of the government of the United States, and was no longer to be regarded, to this purpose, as a citizen of Vergennes. But upon the question, what would have been the effect of the enlistment, had the plaintiff possessed no taxable estate, we give no opinion.

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January,  
1834.

Wheeler  
vs.  
Seymour &  
Jedlin.

### CHARITY HOLCOMB vs. LOVINUS STIMPSON.

The compromise of a prosecution under the statute relating to bastards and bastardy is a good consideration for a promissory note executed for that purpose by the defendant.

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January,  
1833.

Such a prosecution is a civil suit and may as well be made the subject of a compromise, as any other civil suit, and a promissory note given to effect such compromise, before the birth of the child, cannot be avoided, by showing that the person accused could not have been the father, unless fraud or imposition, in bringing about the compromise, be also shown.

When a promissory note is given to compromise a contingent liability, the note can never be avoided by showing that the maker of the note was not in fact or in law liable.

In this case defendant was sued upon a note of hand, purporting to be payable to plaintiff for twenty-six dollars, dated August 16, 1834 and to be due and payable on or before the 1st day of January A. D. 1835. The case was tried before a justice of the peace; there was a judgment for defendant and it was appealed to this court.

The defendant offered evidence to show that the note was given, together with the others, upon the plaintiff's having, (upon a prosecution under the act relating to bastardy,) sworn that he was the father of a bastard child, begotten upon her body on the 20th day of November 1833, and upon a settlement or compromise of said prosecution; that he was absent from the state from said 20th day of November 1833, to the 20th day of June A. D. 1834, and that the alleged child was born on the 27th day of September 1834, at a period so far beyond the ordinary term of gestation as to have made it impossible that the oath of said plaintiff could have been true, or that he could have been the father of said child; and contended that upon this showing, the note was without consideration and absolutely void. The plaintiff objected to the evidence and it was rejected by the court, and judgment rendered

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for the plaintiff on the note. To which opinion of the court defendant excepted.

*P. C. Tucker for defendant.*—The defendant contends that the evidence offered in this case should have been allowed to go to the jury, and that it was their province to determine the fact from such evidence whether any consideration existed for the note or not, at the time it was given. We contend that the consideration of the notes failed altogether, if the defendant was not in fact the father of the child sworn upon him by the plaintiff.

That circumstance being the essential one in determining whether he was the debtor of the plaintiff or not, and the consideration of the note being that indebtedness or liability and nothing else.

If it be said that the giving of the note was an acknowledgment of improper intercourse between the parties, and that that is a good consideration, we reply that such consideration is infamous, and that a promise founded upon it is void.—Chit. on Con. p. 216.

*Woodbridge and Pierpoint for plaintiff.*—1. The plaintiff contends that there was no error in the decision of the county court in excluding the evidence offered by the defendant. By the statute of Vt. p. 366 it is enacted that when any single woman shall be delivered of any bastard child or shall declare herself to be with child, and that such child is likely to be born a bastard she may in either case charge any person in writing and on oath with having gotten her with child and being the father of such child. And the same statute makes the woman a competent witness in the case unless rendered incompetent by conviction of any crime which would by law disqualify her from being a witness in any other case, and the same statute enacts that the woman may settle and compromise any such fornication in certain cases, and this appears to be one.

It will certainly be asking too much to say that after the defendant had executed his notes on this settlement of such prosecution, thereby fully acknowledging his guilt in this manner, to do away the note and thereby preventing the plaintiff from being a witness in the case which by law she is made.

2. A discharge by a mother of an illegitimate child of a prosecution instituted by her under the statute is a good consideration for a note executed by the father in the settlement thereof.—*Hobbs vs. Hobbs*, 1st Vt. R. p. 286.

3. Defendant cannot avoid a contract or promise to pay the ex-

pense of a bastard child by showing that he is not the father of it, in an action upon such contract.—*Com. on Con. vol. 2 p. 354-5.*

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January,  
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Holcomb  
vs  
Stimpson.

The opinion of the court was delivered by

REDFIELD, J.—Two questions are made in this case. It is first urged that the compromise of a prosecution for charging defendant with the maintenance of a bastard child is not a good consideration for a promissory note, if in point of fact the defendant was not the father of the child.

1. It is said if the defendant was not the father of the child, it is to be presumed there had been previous cohabitation between the parties, which remains the sole consideration for the note.—Previous or expected future cohabitation is of itself no legal consideration, but illegal, unless connected with seduction and given on that account, not as the price of illicit cohabitation, but of lost character and abuse. But the compromise of a prosecution of this kind is clearly both on principle and authority a sufficient consideration for a promissory note.—*Haven vs. Hobbs*, 1st Vt. R. p. 236.

A prosecution under the statute relating to "bastards and bastardy," is a civil suit (*Gaffory vs. Austin Franklin Co.* Jan. 1836,) and as such, the complainant, except in one event, has the same power to compromise as in any civil suit. The statute, in denying to the mother the right to compromise, until three months after the arrest of the putative father, or after the overseers of the poor have commenced or controlled the prosecution, or declaring such compromise void or against the overseers of the poor, implicitly recognizes the right of the mother to make a valid compromise in regard to all other persons.

2. It is said, the testimony offered by the defendant and rejected by the court to wit, that defendant had no access to plaintiff for more than ten months prior to the birth of the child, showed, if believed, a total failure, or rather want of consideration.

No doubt a consideration of this character might be impeached by showing fraud and imposition, as that the plaintiff had never been with child and this known to her at the time of the compromise. It might be impeached by showing that the defendant was induced to make the compromise by the improper duress of a *falsely* arrest, or by such threats as would be likely to operate upon the apprehensions of a man of ordinary sagacity. But the consideration clearly could not be impeached by showing a mutual mistake in regard to the facts as was pretended in this case.

It is not necessary to say that the testimony offered by the de-

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defendant in this case, would not in the estimation of scientific men, render it quite certain the defendant was not the father of the child. The question if submitted to a jury would still be one of great doubt; for as is said in Roll. Abr. "the law does not appoint any certain time for the birth of a child," 1 Roll. Abr. 356. And in the opinion of the celebrated Dr. Hunter solicited and obtained by the learned editor of the institutes, it is asserted that some "women have been delivered of children more than ten calendar months from the conception.—4 Petersdorff. 177.

But however conclusive the testimony might be in any given case to show the defendant could not have been the father, it is a defence which he could not be permitted to set up to a promissory note given to compromise a prosecution, which had been, or was about to be commenced against him in good faith.

The defendant was not deceived. He had all the means of knowledge which plaintiff had. If there was any mistake it was a mutual mistake. There was no condition annexed to the compromise. If the mother had been delivered of two children, which had lived and required support, he could not have been compelled to pay any thing more, and if the child had died at the moment of birth he could not have resisted the payment of the sum stipulated.

It is not true that here has been a failure of consideration. For the notes are not given as the payment of a certain and fixed liability, but for the compromise of a doubtful claim, one object undoubtedly was to get rid of the prosecution, both in its natural and accidental consequences. This was all defendant expected and all he expected by the compromise, and was the consideration of the note now in suit. This consideration has not failed. There is no pretence the plaintiff acted in bad faith, or can now obtain compensation against another. This compromise will be such a declaration of the paternity of her child, as will effectually defeat any attempt to charge it upon another. The defendant too has admitted himself the father, by the compromise, and he cannot now be permitted to contest that fact.

The surceasing of a suit even for a time is always a good consideration for a promise. So also is the compromise of a doubtful claim. And in the latter case the defendant cannot be permitted to resist a recovery on the promise, on the ground, that he was not liable, that facts have now transpired, which will enable him successfully to resist the claim. This would be to disregard the compromise of every doubtful claim, and open every dis-



pute put at rest by the agreement of the parties, for fresh litigation. It would in fact render it impossible for the parties ever effectually to compromise a matter by contract or agreement. In the present case it will result in a trial upon the merits of the original controversy, with this disadvantage to the plaintiff that her testimony, which the statute makes competent only on the trial of the issue of chargeable or not, could not be received. Such a doctrine could not for a moment be admitted. The case of *Shaw vs. Whittemore*, Peaks cases 24, abridged 4 Petersd. 185 is almost directly in point. There the defendant had allowed the mother seven shillings per week for the maintenance of the child, which sum he had paid regularly for some time. On the trial, after proof of defendant's agreement to pay seven shillings, he offered to show that he had now discovered "the right father" of the child. Lord Kenyon said the testimony could not be received.

In New-York it has been held (*Steele vs. White* 2. 478.) *x Paige*  
 "That when a person interested in a suit voluntarily compromises the same without any fraud or imposition practiced upon him he cannot be released from the compromise, (even in equity) although he shows it was not beneficial to him or that he had the right to recover in the suit in law." The same principle had been repeatedly recognized in their courts of law before. The decisions which have been had upon wagers at common law recognize the same general principle in one particular, that although the event had actually transpired, still if it was unknown to the parties, and a wager was laid upon the event, it was a good wager.—*Boman vs. Boman*, 8 Conn 409.—*Earl of March vs. Piggott*, 5 Bur. 2802.

In Pennsylvania (*O'Keason vs. Barclay*, 2 Penn. R. 531,) it has been decided that the compromise of an action of slander in which the words laid in the declaration were not actionable, is a good consideration for a note for the payment of money.

Indeed it is a principle too obvious to the perceptions of all, of too universal application, and too generally recognized by adjudicated cases; to require further discussion.

This note being given before the birth of the child and upon a contingent liability, a case might occur in which the defendant would be exonerated from all liability on the note. This would be the case of the overseers of the poor prosecuting on behalf of the town and compelling the defendant to maintain the child. Here would be a failure of the consideration unless the risk of this was to rest upon defendant by the terms of the compromise.

The judgment of the county court is affirmed.

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 January,  
 1838.

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 vs.  
 Stimpson.

ADDISON,  
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1836.

## JOSEPH CARTIER JR. vs. JOSEPH PAGE.

The act of the Provincial Parliament in Lower Canada, passed in 1793, declaring that suits shall be brought on promissory notes within five years, or shall be considered as paid and discharged if the debtor makes oath that the same is paid, is considered as a statute of limitation, or a statute prescribing a mode of proof, and as such has no force in this state. The statute only effects the remedy and not the contract.

The action in this case was assumpsit founded on a promissory note written in the French language, and of which the following is an accurate translation :

"St. Antoine, April 8, 1819.

£22,5,0.

In the course of next summer, I, Joseph Page, residing in Vermont, Addison County, town of Monkton, I promise to pay to the order of Mr. Joseph Cartier Jr. of St. Antoine, Chambly River, twenty-two pounds, five shillings currency, for value received in merchandise.

(Knowing not how to sign, he made his usual mark in presence of the undersigned witnesses, the note having been read before signing.)

JOSEPH <sup>his</sup> ~~mark~~ PAGE,

F. BOUTILLIEU, }  
L. CHEVAL, } *Witnesses.*

The defendant pleaded in bar to the action that by an act of the Provincial Parliament of the province of Lower Canada, passed in the 34th year of King George the third (A. D. 1793,) all notes of hand upon which no suit or action should be brought within five years next after the day on which such promissory note became due and payable, were taken and considered to be paid and discharged, and set forth the act aforesaid in the words following to wit :

"And be it further enacted by the authority aforesaid" (meaning the King of Great Britain and Ireland by and with the advice and consent of the legislative council and assembly of the province of Lower Canada, constituted and assembled by virtue of, and under the authority of an act of the Parliament of Great Britain, passed in the 31st year of the reign of King George the III, entitled "an act to repeal certain parts of an act passed in the fourteenth year of his majesty's reign" entitled "an act for making more effectual provisions for the government of the province of Quebec in North America and to make further provisions for the government of said Province") "that every promissory note, already made and due, shall be taken and considered to be paid and

discharged, if no suit or action is brought thereon, within three years from and after the passing of this act; and every such promissory note, already made but not due, or that shall hereafter be made, shall be taken and considered to be paid and discharged, if no suit or action is brought thereon, within five years next after the date, on which such promissory note shall become due and payable. Provided always that any debtor or debtors on such promissory note, shall if thereunto required, make oath, that such promissory note is *bona fide* discharged and paid. And in case of such action being brought against heirs or representatives, against whom an action may be legally instituted, such heirs or representatives shall if thereunto required, make oath, that they do believe that such promissory note, has been lawfully paid and discharged."

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To which said plea the plaintiff filed his replication, setting forth that he ought not to be barred from his recovery in said action, because that at the time of giving said notes and ever since, the said Joseph Page was and hath been an inhabitant of the town of Monkton in the county of Addison and state of Vermont, and without the jurisdiction of the courts of said province of Lower Canada.

To this replication the defendant demurred, and the plaintiff joined.

The court decided that the plea in bar of the defendant was insufficient, and that the plaintiff have judgment for his damages and costs. To which decision of the court the defendant excepted.

*Messrs. Tucker and Briggs for defendant.*—The question in this case, is upon the sufficiency of the plea in bar.

1. Is the statute of Canada an absolute bar to a suit on a note which has been due more than five years, with the exception provided?

2. Are we to treat the statute of Canada as a statute of limitations and apply to it the same construction which has been applied to the statute of James I, by a course of judicial legislation?

The contract declared upon was executed in Canada.

It is a familiar doctrine, that the *nature, validity and legal effect* of a contract, are to be governed by the *lex loci contractus*.

But the remedy for a violation of a contract must be pursued by the means prescribed by the *lex fori*.

The *lex loci contractus* regulates the contract in every thing but the remedy; the legal effect, validity, duration and nature of the contract, belongs to the *lex loci*.

The remedy consists in the form of action, the process and its incidents, which must of necessity be regulated by the *lex fori*.

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We are aware that the statute of limitations has been considered as effecting the remedy, and to be governed by the *lex fori*, but this has been confined to limitation statutes and not to absolute bars and discharge by statute.

Unless the plaintiff shows that this statute has received a similar construction to the statute of James I by the courts of Canada, the court cannot put that construction upon it, as the terms made use of are not similar but as broad and effective a bar as any language could express. It would be unnecessary to plead this statute in Canada specially. But the statute gives to the contracts therein specified their legal effect and is a part of the *lex loci*.

By the laws of Scotland bonds are assignable and a suit may be brought in England or here on such bond in the name of the assignee, because the *legal effect* of the bond and assignment made in Scotland, is to vest a legal interest and right of action in the assignee.

An indorsee was allowed to maintain a suit against the maker in the circuit court of the U. S. setting in Connecticut on a note made and endorsed in New York, when the note was not negotiable by the law of Connecticut.—3 Day 311.

A discharge under a bankrupt law of any state is a good bar to an action brought in another state of which the creditor is a citizen, the contract sued having been made within the state which enacted the law and the debtor being then a citizen at the time of making it, although the claim is not presented or any dividend having been paid on it.—*Blanchard vs. Repell*, 13 Mass. 1.

It has been decided by this court that a contract made in N. H. and not presented there before commissioners under the law limiting the time of presenting claims under their probate laws and barring claims not presented, may be plead in bar here upon suit on the contract.

This statute goes to the discharge of the contract and is not confined to remedial pursuit of the contract.

*Mr Linsley for plaintiff*.—1. The statute of limitations of one country cannot be pleaded in bar to an action commenced in another. The laws of a place where a contract is made operate upon the character, validity and construction of the contract.

But the laws of a place where the contract is sought to be enforced must control in relation to the form of action, course of judicial proceedings, and time when the action may be brought.—*Pearsall et al. vs. Dwight*, 2 Mass. 84.—*Byune vs. Crowningshield*, 17 Mass. 55.—*Lodge vs. Phelps*, 1 Johnson's cases 139.

2. The law of Canada relied on is in substance a statute of limitation. It does not by its own power discharge the action but it merely points out a mode by which after a certain lapse of time the maker of a note may by doing certain acts, discharge the contract. The maker of the note must take an oath before the court. This necessarily opens the subject for inquiry.

That this defence cannot avail him, is obvious from this consideration. If available, it would be necessary for this court to administer this oath, and proceed in the progress of this suit, agreeably to the laws of Canada, and in derogation of our own laws, which is wholly inadmissible.

3. If the statute of Canada can be interposed, it cannot be done in this form, for the statute is only made operative by the oath of the party, and the plea does not allege that he has ever taken this oath, or is ready, if required; which is essential to constitute a discharge.

4. Suppose the statute to be an entire discharge of the maker of the note, both parties living in Canada, yet it would not operate to discharge the maker living under a different jurisdiction.—Story's conflict of law, 487.

5. It is a settled rule, that the *lex loci* does not prevail where the parties at the time of making the contract, had the law of another kingdom in view. As defendant was then resident in the United States, it may reasonably be inferred that the contract would be enforced in the United States.—Story's conflict of law, 272.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The question to be determined on the pleadings is, whether the act of the Provincial Parliament of Lower Canada, plead in bar to the plaintiff's action, is to be considered as governing the nature, validity and legal effect of the contract declared on, as part of the *lex loci*, or as only a law regulating the remedy to be had, for enforcing the contract. If the act belongs to the former class, the contract, if discharged in Canada, is discharged every where. If it belongs to the latter, it has no effect here. In deciding this question, it is immaterial what are the particular words made use of in the act, if, in effect it only operates to suspend or take away the remedy. The words of the statute are, "that all promissory notes on which no suit is brought within five years next after it shall have become due and payable, shall be taken and considered to be paid or discharged, provided the debtor will make oath, if required, that such note is paid and dischar-

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ged." It will be remembered, that all statutes of limitation are founded on the presumption of payment. The language of this statute only declares that presumption in terms.

The debt is not discharged directly by the words or terms of the act itself, as the debtor is further required to make oath to the payment, before this presumption is established. Considered as a statute of limitation, it has already been decided repeatedly, that such statutes effect only the remedy, and are of no avail to protect the debtor from a suit in any other government, notwithstanding all remedy may be taken away in the places where the debt was contracted and in which the parties may have resided.

This statute may also be considered, not only as a statute of limitation, but also as an act regulating the proof or evidence to be received by the courts of the government where the statute was passed. It in effect provides, that lapse of time, together with the oath of the debtor that the note is paid shall be considered as conclusive evidence of payment. It is very obvious that the courts of no government can recognize the statute of a government foreign to them, prescribing the mode of proof, the manner of taking evidence, or declaring what shall be received as evidence of any particular fact. If this statute is to have its effect here on this contract, our courts must administer the oath required by that statute; an oath not directed by, or known to any law in operation here, but prescribed by a foreign government, and thus change the mode of proof adopted here for the one there prescribed. This, we apprehend, would not be warranted by any principle of law whatever. The result therefore is, we consider the plea in bar insufficient. The act, we are informed, is considered by the courts in the province of Canada as no more than a statute of limitation. Such, at any rate, are our views of it, and judgment must be rendered accordingly.

The judgment of the county court is affirmed.

## EBEN BIGELOW vs. JOHN B. HUNTLEY.

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A delivery of property to another, to be paid for at a given price, and to become his, upon condition that the price be paid, is not fraudulent as against the creditor of the vendee.

And in case it be attached by the creditor of the vendee, before condition performed, the vendor will hold the same against the attaching creditor. The vendor has a right, in such case to determine the bailment, and resume the possession.

And, although a specific time is given for the payment of the price, which has not expired, yet, if the property be attached upon process against the vendee, and the vendor receipt the same to the officer, he becomes entitled to the possession, and may maintain trespass or trover against a subsequent attaching creditor of the vendee, who takes the property from his possession.

In such case, the right of possession being in the vendor, though only as receiver, the rule, that the plaintiff can not recover when he has not the right of possession, does not apply.

This was an action of trover for a pair of horses. It appeared that on the 10th day of September 1834, one George Gray purchased a pair of horses of the plaintiff, to be paid for in drawing lumber within two years from the purchase, and that if the horses were not paid for at the end of two years, then the said Bigelow was to have a right to the horses. It further appeared that the horses were exchanged in October 1834 for the horses for which this suit was brought. That said trade was made by Gray, but that, before the exchange was completed Gray and Adams, the man with whom the exchange was made, came to the house of Bigelow, when Bigelow consented that the trade might be made if Gray was disposed. Some time in February the horses in question being in the possession of Gray, Bigelow the plaintiff applied to one Farnet Brown, to whom the said Gray was indebted, to attach the horses and told him if he would make the attachment, he, said Bigelow, would pay the cost of said attachment; that said Bigelow then stated that said Gray was about to abscond and he, Bigelow, wished to get possession of the horses, and the said Brown on the information of said Bigelow made the oath requisite by the laws of New York to enable him to procure an attachment against the property of said Gray. The attachment was made and the horses delivered by the officer to the plaintiff.

The defendant offered evidence tending to prove that the said Gray offered to receipt the said horses at Ticonderoga where they were attached; but that the officer, who acted under the direction of Bigelow declined taking the receipt offered by Gray and brought the horses to Ticonderoga and delivered them to Bigelow and took

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his receipt therefor, and that afterwards to wit, on the 14th day of March 1835, said horses were taken in the town of Bridport as the property of said Gray by defendant as constable on an execution against said Gray; and plaintiff demanded said horses some time in March 1835, of defendant. The defendant also offered evidence tending to show that said horses were called Grays by Gray with the knowledge of Bigelow and without any dissent from Bigelow.

The court charged the jury that such contract of sale was a mere bailment; and did not entitle the creditors of Gray to attach the property.

The court also charged the jury that the attachment by the defendants of said horses put an end to said contract or bailment if it was not determined before; and that said Bigelow would have a right to reclaim the horses on the attachment by said defendant. To this charge the defendant excepted.

*Mr. Linsley for defendant.*—A sale of property with a secret condition in the contract that the property shall not pass until paid for, seems to be introducing a principle entirely at variance with the construction given in this state, to the statute of frauds. From the nature of the case, if the principle obtain, the condition of the sale will be kept secret, while the transfer on the face of it is absolute. The buyer and seller are equally interested in concealing the conditions of the sale.

It is said this is a mere bailment. But there is a very wide distinction between the two cases. In the case of a bailment no one is misled or deceived, because the parties do not talk of it as a sale. But in the case of a mere bailment in fact; if the bailor should permit the bailee to call the property his own, and represent it to be a purchase without taking any measures to undeceive the public, it is conceived the creditor of the bailee might attach. This is analogous in its operation to a sale of chattels, absolutely on its face, but when there is at the same time a secret condition, by which it is turned into a mortgage.—Starkie 618 note.

2. Bigelow permitted Gray to call the horses his own without any dissent on his part and thus gave Gray a false credit.

3. The plaintiff acquired no right to the horses by receipting them to the officer. For the procuring the suit to be brought was itself a wrongful act; and the officer, it appears, acted under the direction of Bigelow, and such a use of process as it disclosed here cannot be set up to protect Bigelow. He must stand on the same footing he would have done, if the horses had not been attached by



Brown. But at all events, as by receipting the property, he would acquire a new lien for a special purpose, in order to avail himself of this he must show that the lien created by the attachment continued at the time of the taking complained of. It does not appear that Brown ever proceeded to judgment or continued the time. But if he had any right as receptor it was only to the amount of Brown's claim, for that was the extent of his lien.

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4. In order to maintain trover the right to the possession is indispensable; and if we are right in the previous point, it is clear that Bigelow had no right to the possession of this property. By the terms of the contract he had for two years parted with the right of possession, and his remedy, if he have any, before the two years have expired, must be case and not trover.—Saunders's Plead. and Evid. 880.—*Gordon vs. Harper*, 7 Tr. R. 9.—*Benjamin vs. Bank of England*, 3 Camp. 417.—*Soper vs. Sumner*, 5 Vt. R. 274.

5. But the court charged the jury that the attachment by defendant put an end to the contract of sale. This part of the charge rendered immaterial what happened upon the attachment in New York, so that the case may be treated as though no such attachment had taken place.

*H. Seymour for plaintiff.*—The only question in this case is, whether the contract between Bigelow and Gray, was such an one as vested in Gray the title to the horses, so as that the creditors of Gray might attach them.

A sale of personal property on condition that 150 dollars be paid at a future time, does not vest the title in the vendee.—17 Mass. R. 606, *Marston vs. Baldwin*.—Starkle 1642-1485 and note.—4 Vt. R. 558.—4 Mass. 405.

It appears that Bigelow agreed with Gray, that he might have the horses for 200 dollars, to be paid in drawing lumber in the course of two years, and if not paid for in that time Bigelow was to have the horses.

It was evidently the intention of the parties, that with the labor of the horses in drawing lumber, Gray should pay for them, and the horses were put in Gray's possession for the purpose of enabling him to do this. It was a mere bailment for this special purpose, and the parties must have had in view the drawing of lumber at Crown-Point where the parties resided. The general property in the horses remained in Bigelow and a special property only in Gray for a specified object. Any act of Gray, or of others in

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relation to the horses inconsistent with the carrying into effect the contract by drawing lumber with the horses, put an end to the bailment. And the charge of the court that Bigelow could maintain trover for the horses against the person who attached them as Gray's property was correct.—5 Mass. 104.

The opinion of the court was delivered by

**PHELPS, J.**—The sale of the horses by Bigelow to Gray was conditional. This being the case, the general property never passed. These sales are frequent, and it has always been considered that payment of the stipulated price was a condition precedent.

It is argued that such a sale is fraudulent in its effect. But we believe no case can be found, in which a mere conditional sale of this character has been held fraudulent in itself. The possession is consistent with the contract. And where there is no deception, there is nothing to sustain the suggestion of fraud. False representations may indeed be made, and where this is the case, the usual consequences of fraud follow. But the mere circumstance that the vendee is entrusted conditionally with the goods, and appears as owner, is not sufficient to divest the vendor of his property.

It appears in this case, that Gray called the horses his, with the knowledge of the plaintiff; but this does not appear to have been done, under such circumstances, as required of the plaintiff to disclose their real situation.

The more serious question involved in this case, arises out of the technical objection, that the plaintiff having parted with his right of possession, for a limited period, which had not expired, at the time of the supposed conversion, cannot sustain the action. Upon this point we are not unanimous. Yet there are two different points of view in which the case may be regarded, which have satisfied a majority of the court that the plaintiff is entitled to recover.

*First.* We regard the payment of the stipulated price, as a condition precedent. The general property in the horses, therefore, remained in the plaintiff. By virtue of the attachment at the suit of Brown, and the consequent proceeding, the right of possession also vested in him. These proceedings, although instigated by the plaintiff, were undoubtedly valid as against Gray; and the right of the attaching creditor, the officer and the plaintiff, or receiptor, were the same, as if the plaintiff had had no agency in getting up the proceeding. The general property and the right of possession being thus united, the technical rule of law is satisfied.

It may be argued that in this view of the subject, the plaintiff is entitled to recover, only to the extent of his interest as receiptman. This by no means follows. If the plaintiff be entitled to recover at all, he may doubtless recover to the extent of his interest in the chattels. And if it be admitted, that an action on the case could be sustained, for the injury to the plaintiff's reversionary interest, there seems to be no reason why, if this action be sustained at all, that injury should not be here considered. Certain it is, that a recovery here would be a bar to such an action hereafter as no two actions could be sustained, by the same person, for one and the same tort. It would certainly be an anomaly in the law, if the plaintiff could recover only a partial compensation in this suit, while at the same time the recovery is a bar to a further remedy.

In short, the right of possession being in the plaintiff, the objection fails altogether. The supposed right of Gray can have no bearing on the question of damages. Besides, Gray could maintain no action for the taking by the defendant, he not having, at that time, the right of possession. The reason of the rule therefore fails in this case.

*Secondly.* Another view of the case is this. The contract being conditional, whatever determines the condition, would revert in the plaintiff the right of possession. A sale by Gray would have this effect; and so, in my judgment, would an attempt to abscond with the property, or his becoming bankrupt. Various contingencies might determine the bailment, and in whatever way this is done, the right of the plaintiff to resume the possession accrues.

This, it seems to me, results from the nature of the contract. I see not how the right of the plaintiff can otherwise be protected. And if the creditors of Gray can protect themselves in attaching it, by the technical rule relied on, the conditional contract is converted into an absolute sale; for clear it is, that Gray can maintain no action against his attaching creditor.

There is, in my judgment, a wide difference between this case and *Gordon vs. Hooper*. There the contract was absolute, here it is conditional. The general property in the horses is retained by the plaintiff for no other purpose than to guard against the insolvency or want of responsibility of Gray. If we hold to the legality of this feature in the contract, it seems to me, we must give it full effect, and consider the plaintiff at liberty to determine the bailment and resume the possession, whenever it becomes necessary for the protection of his rights.

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On these grounds, a majority of the court are of opinion, that the decision of the court below was right, and their judgment is affirmed.

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ELIAS HALL vs. ALMIRA HALL.

(In Chancery.)

If a plaintiff bring *scire facias*, and revive a judgment, he obtains no interest, nor can he ever afterwards revive that claim for interest.

If part of a judgment be apparently satisfied by a levy of record of the execution on real estate acquiesced in by both parties, and the balance of the judgment be revived by *scire facias*, and afterwards the levy be declared void, the amount of the levy may be revived, and the statute of limitations will only run from the time of the levy being declared void.

The object sought in the bill and cross bill is to compel the offset of claims existing between the parties. The questions here decided arise upon the claims set up in the cross bill.

It seems by the cross bill and answer that as early as the January term of this court A. D. 1823 Almira Hall obtained a decree of alimony against Elias Hall of \$750, payable in equal annual instalments of \$75, without interest, condition that Almira should be entitled to execution for the whole, unless Elias give satisfactory security by some short day. The security not being given execution was taken for the whole sum, and levied upon certain lands of said Elias in satisfaction of \$144,75 of the same. This levy was dated on the 5th day of May 1823, one day after the expiration of the time limited in the execution for the return of the same. The said Almira went into possession of the land under the levy and continued to occupy the same without molestation from said Elias until the year 1830, when he instituted an action of ejectment for the land and recovered not only the land, but damages for rents and profits at the January term of this court 1831. On the 6th day of October 1823, Almira Hall took execution for the balance of her decree of alimony being \$605,25, upon which Elias was committed to jail and there continued until the month of December 1825, when he was released on *habeas corpus*. She brought *scire facias* on her decree of alimony and asked for a new execution for the \$605,25, which she obtained without interest at the January term 1831 in this court. The cross bill now asks that the interest which had accrued upon the \$605,25, for which judgment was rendered in the *scire facias*, without interest, may

be allowed and offset against the claim set up in the orator's principal bill, and also that the amount of \$144,78 and interest from the time of the decree of alimony may be recovered and set off in the same way.

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The orator in his answer to the cross bill insists that the first of the claims here set up is merged and gone by the judgment on the *scire facias* and,

2. That by the terms of the original decree the said Almira is not entitled to interest thereon.

As to the second claim, the orator in his answer to the cross bill insists, that it is barred by the statute of limitations and,

2. That it is merged or abandoned by the judgment on the *scire facias*.

The case is set down for hearing on the bills and answers.

*H. Seymour for A. Hall.*—Almira Hall claims—1st. Interest on that part of the decree not satisfied by [the levy of execution on land, from January 1823, to January Term 1831.

2dly. That part of the decree that was satisfied by the levy of execution on land, to wit, \$144,75, and the interest on it from the date of the decree.

3dly. What remains unsatisfied of the execution obtained at the January Term 1831 with interest on the same.

The decree or judgment of January Term 1823 carries interest, and thus interest is legally and equitably due to Almira; and the said sum of \$144,75 is both legally and equitably due her, and she has a right to recover both of said Elias, unless prevented by some legal impediment arising from proceedings since the decree.

In suits on recognizance, jail bonds and in actions of debt on judgment or decrees, courts have always given interest from the time of the judgment or decree. The statute expressly declares that judgments shall carry interest after sixty days.—Vt. Stat. p. 216.

Almira is not either in law or equity precluded from claiming of said Elias the interest on said sum of \$605,25 from the time of the decree nor from claiming said sum of \$144,75 and the interest on it by reason of the *scire facias* and the proceedings thereon.

Because, a party's being concluded by a former judgment depends upon the fact of the matter in controversy having been put in issue and decided in the former suit.—Starkie Ev. vol. 1. p. 199.

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And because, on said *scire facias* in January 1831 the court did not adjudge that Almira was not entitled to interest on said sum of \$605.25, nor that said sum of \$144.75 was not due and owing to Almira, nor was the judgment of the court in said *scire facias* final and conclusive as to either the claim of interest or the claim for said \$144.75, as neither of these matters were then before the court for their decision, and they could not and did not pass upon them or either of them. At the time of praying out said *scire facias* the defect in the levy of the execution on land was not known and not mentioned in the writ of *scire facias* and of course the claim for said \$144.75 was not before the court for its decision upon it.

The *scire facias* prayed for an execution on the original judgment or decree for that part of it not satisfied by the levy on land. It did not ask for interest on the original judgment, and if it had the court could not consider the question of interest as properly before them on a *scire facias* for an execution, and however well satisfied that interest was legally due on said decree, could not and did not decide that question.

A *scire facias* to renew execution is nothing more than a motion for that purpose in court with notice to the other party to show cause, and does not bring before the court the question of interest on the judgment.—Davis Dig. vol. 6 p. 464-5.—2 Saund. 72.—1 T. R. 388.

The execution awarded by the court on the *scire facias* was an execution on the original decree of 1823 and by the statute 1822 the officer would collect interest from 60 days after the judgment of 1823.

The claim for \$144.75 and the interest on it is not barred by the statute of limitations. Because chancery in adopting the statute as their rule as to the limitations of suits will look at the spirit and intent of the statute. There was no acquiescence by Almira that should prejudice her claim.

Almira was in possession of the land and until Elias brought his action to recover the land, or until the court decided that the delay of the officer in returning the execution to the clerk of the court, no laches could be imputed to Almira.

*Scire facias* to obtain new execution where there was a void levy.—7 Conn. R. 119—124.—Swift's Dig. 583,—5 Conn. 127. 2 Conn. 143.

The statute of 1835. p. 5, secures to Almira her right to claim

the \$144,75. It cannot be objected to this statute that it is retro-active.—4 Conn. R. 210—223—4.—7 Conn. R. 350.

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It is no objection to Almira's claim for the interest on the \$605,25 from the time of the decree, that the proceedings in this case have been such that the law may not furnish her a remedy that would reach the case. If this interest is justly and equitably due to her from Elias, this court will furnish a remedy.—1 Mad. Chan. 29—47.—2 Atk. R. 219.

Almira might sustain her claim to this interest on the ground of the strong equity of the claim as exhibited by the history of this whole matter and by the application of the maxim that "he who will have equity done him must do it himself to the same person." Elias comes into the court to ask its aid. Shall he have it except on condition that he do equity in this thing to Almira? 1 Mad. 88.

In an usurious contract relief refused unless money actually brought into court.—1 John. Chan. R. 365—439.

So in decreeing a specific performance of a contract, and in other cases, the court will require that the person applying for relief shall first himself do equity.—1 Mad. 106.—2 Mad. 640.

We contend further that if the statute of limitations should be supposed to present any difficulties in the court's giving Almira such remedy as the equity of her case requires, the statute passed Nov. 9, 1831, p. 23, Vol. 2 Comp. L., does away the effect of the statute of limitations in case of mutual claims so far as an offset may be made. And that the strongest equity requires that the interest on said \$605,75 be allowed her as an offset to the judgment obtained by Elias for rents and profits and costs in his ejectment suit.

*Judge Phelps for orator.*—I. As to the set-off prayed for in the orators bill we consider it a matter of course unless good cause be shown to the contrary.

The only serious question in the case concerns the claims which the respondent seeks to bring into the account.

II. Neither of the claims set up in the cross-bill are admissible.

1. The claim for interest on the original decree for alimony is preposterous for two reasons.

*First.* It has already been adjudicated upon in the proceedings on the *scire facias* in 1831. Interest is an incident merely for the principal debt and cannot be made the subject of litigation distinct from and independent of that principal.

*Second ly.* The decree for alimony did not carry interest. To

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add interest to it at this day would be to vary the import and effect of that decree and at the same time to enhance its amount.

2. As to the sum of \$144,75 claimed as a balance of the original decree, the claim has long since been put at rest by the statute of limitation.

The statute of limitation is a bar in equity as well as at law in all cases where courts of law and of equity have concurrent jurisdiction. It is only in cases of trust and the like, which are cognizable only in equity, that the statute does not apply.

The applicability of the statute to this case has been determined in the case of *Hall vs. Tomlinson* decided in this court in 1834, which was an action against the sheriff for a default in not levying the execution in question.

The opinion of the court was delivered by

REDFIELD, Chen.—We have in this case as the offspring perhaps of an unhappy marriage, and a necessary divorce and decree of alimony, in such terms as to keep alive the remembrance of the calamity, the pitiful results of almost twenty years litigation, a term more than sufficient to have earned honors and performed the duties of a well spent life. If we can contrive effectually to bury this numerous and rather novel progeny of law suits out of sight, and forever, we cannot fail to perform important service to the parties. This we hope to do consistent with established principles. The judgment which Elias Hall set out in his bill is admitted to be due. There is also admitted to be due, Almira Hall a balance of the judgment obtained on the *scire facias*. The only questions to be here decided, arise on the claims set forth in Almira's cross bill.

The oratrix here claims the interest, which in an action of debt, she might have recovered on the judgment, which she saw fit to revive by *scire facias*. It is well settled that on *scire facias* to revive a judgment no damages can be awarded. The writ claims none. The object of the writ is merely to revive the judgment and no interest can be added to it. Execution upon the judgment, in *scire facias* must issue for the same sum of the original judgment. At common law, not only could no damages be recovered, but no cost until the statute of 8 and 9, W. III, c. 11, which provides for costs.—14 Petersdorff 386.

As the debtor had been discharged on *habeas corpus*, no good reason is now perceived why the oratrix might not have brought debt upon the judgment. *Scire facias* is the most common al-



not the exclusive remedy. But the judgment having been revived by *scire facias*, the plaintiff failed of course, of obtaining execution of the interest which had accrued; and we think thus lost the claim for interest. It will not be allowed to separate the interest from the debt of which it is a mere incident. The judgment upon the *scire facias*, so far merged the judgment for alimony, that the portion not covered by the levy was gone. It became a new debt and could never be declared upon as a judgment of any other term than that of the judgment on the *scire facias*.

We are the more reconciled to this result from the consideration that the original decree was not to have been upon interest, and become an absolute debt at the time it did, only upon the failure of the defendant to comply with a condition which might have been rather his misfortune than his fault; and being in the nature of a penalty it is always in the power of this court to grant positive relief whenever the case is of sufficient magnitude to require interference in that way. But here the relief is already afforded by the abandonment of the claim for interest expressed in bringing *scire facias*, instead of debt to revive the decree of alimony. This claim for interest on that portion of the decree of alimony included in the judgment on the *scire facias* is disallowed.

The other claim set up by the oratrix in her cross bill is the sum covered by the levy which was declared void by this court at the January term 1831.—*Hall vs. Hall*, 1 Vt. 304. This sum of \$144,75 and the interest is most manifestly due in equity, unless the right of recovery is barred by the statute of limitations or merged in the judgment on the *scire facias*. But as at the time of bringing the *scire facias*, this sum now in controversy, appeared satisfied of record by a levy acquiesced in by both parties, and as it was expressly excepted from the judgment on the *scire facias*, we think it was not affected by that judgment. Had all the judgment except the amount covered by this levy been paid, it cannot be pretended that this could have effected the right to pursue this after the levy had proved ineffectual. Nor can we perceive why reviving that balance on a *scire facias*, which became necessary after the discharge, should have this effect. It is true that the operation of the judgment on *scire facias* was to subdivide an entire claim. But this is a result which must always follow, when a judgment is partly satisfied by a levy, which afterwards proves defective, as to have been upon property, not the debtor's, if it should have become necessary, during the continuance of this levy to revive the balance of the judgment by *scire facias* or debt. And

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as this is a necessary result we are more satisfied with the subdivision of an entire claim, than the denial of justice upon a portion clearly due.

But it is further urged that the claim is barred by the statute of limitation, and if so, it must be revived in equity.—*Stanniford vs. Tuttle*, 4 Vt. R. 83. But we think that during the continuance of the levy, a satisfaction appearing of record and both parties acquiescing in the legality of the levy, the statute of limitation would not run.

No presumption of payment could possibly arise during this time. And the statutes of limitation all go upon the presumption of payment or that one who has a legal claim will not lie by and suffer it to become old, and not enforce it. And whatever fully and effectually rebuts this presumption, removes the operation of the statute. These statutes like all other statutes are so construed as to advance the remedy and prevent injustice. A strict and literal construction has not been adhered to. Almost all those cases which courts have held not to come within the intent, have still been within the letter of the statute.

A judgment of more than eight years standing, but which the debtor had promised to pay within eight years, would still be barred by the literal construction of the statute. But in the case of *Gailer vs. Grinol*, 2 Aik. 349, such new promise was held to revive the cause of action, to put the judgment upon the same ground as to the statute of limitation, as if rendered at the date of the new promise; and this not because the new promise gave a *new cause* of action, but because it effectually rebutted the presumption of payment resulting from lapse of time. If it were to be treated as a new cause of action the remedy should be assumpsit and the statute bar *six* years instead of *eight*, as held by Mr. Justice Hutchinson, in the case of *Gailer vs. Grinol*.

For the same reason it was held in the case of *Ferris vs. Barlow*, Frank. Co. Jan. T. 1836, that when the defendant was committed to jail, the statute of limitation would not bar the judgment during the time of his confinement there. For this effectually rebuts all presumption of payment. And still by the terms of the statute of limitation, the bar would attach in this case as much as any other. And after the discharge of the debtor from jail even by taking the poor debtor's oath, the statute of limitation will revive, and after the lapse of eight years from the discharge will become a bar, as was held in the case last referred to.

In the case of *Baxter vs. Tucker*, 1 D. Chip. R. 353, it was

decided that the statute of limitation did not run against a *scire facias*, brought to revive a judgment, when the execution had been levied upon property not the debtors. And as was held in that case, so here a satisfaction appearing of record, the statute of limitation is satisfactorily answered.

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It may be said the plaintiff's cause of action was not suspended by this levy. But we think that although this was not the case, yet so long as the levy appeared of record as a satisfaction of the sum now in controversy and both parties acquiesced therein, it so far rebuts all presumption of payment, that the statute ought not to operate as a bar. If it were not so decided the creditor in case of a defective levy, under the former law, might lie by until the statute had barred the judgment, and then recover the land and rents, and thus effectually deprive the creditor of all redress. And this may be true in the present case. We should be reluctant to adopt a principle so susceptible of being made the instrument of abuse. And it will be perceived that, if the statute is held to operate as a bar in this case, so must it in all cases, where the levy is in fact defective, although it be in some matter not apparent on the record as that one of the appraisers was interested in the levy or within the prohibited degrees of affinity or consanguinity.

And when this defect is known to the debtor and not known to the creditor, or even fraudulently kept out of sight, still the rule of decision must be the same. We are satisfied that in none of the cases stated should the statute operate as a bar.

The result is that the \$144,75 and interest from the date of the decree is allowed to the oratrix, and is first to be set off against the judgment set up in the orator's bill and the balance of that judgment is to be offset according to the prayer of the bill and no costs allowed to either party.

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**HAMLIN CONVERSE vs. SAMUEL COOK et al.**

If the plaintiff in a decree of foreclosure in chancery receives payment of part of the sum decreed, it opens the foreclosure.

When a purchaser of an estate, incumbered by two mortgages, at the time of the purchase, agrees with the mortgagor to pay the mortgages, and retains a part of the purchase money for that purpose, and goes into possession, he cannot afterwards take a conveyance from the first mortgagee, and set it up against the second mortgagee, notwithstanding he may have been deceived by the mortgagor as to the amount due.

This was an ejectment for lands in Bridport. The plaintiff in support of the issue, gave in evidence a mortgage deed from one Farmery Hemmingway to himself, dated Dec. 2, 1829, to secure payment on a note for \$562,00 together with the terms described in the condition.

Also, a deed from Farmery Hemmingway to Jonas Hemmingway, dated Sept. 20, 1830, and sundry subsequent conveyances showing that the defendants derived their title from said Jonas. The possession of the defendants at the time of bringing of this suit was admitted.

The defendant then gave in evidence, a mortgage deed from Farmery Hemmingway to Vashni Hemmingway, dated May 14, 1814, together with the record of a decree of foreclosure of said mortgage by Edward H. and others, the executors of said Vashni in Jan. 1826 which became absolute in Jan. 1827. And also, a deed from Edward Hemmignway and others, who were proved to be heirs of said Vashni, to Jonas Hemmingway, dated Nov. 8, 1834. The amount stated in the decree to have been due on the mortgage is about \$2,500. No possession of the premises was ever taken nor any steps to enforce said decree by the heirs of said Vashni.

The plaintiff then offered testimony tending to prove that the mortgage to said Vashni had been paid before said decree; and among other things the testimony of a witness that many years since Farmery took to Massachusetts where the said Vashni resided, a large amount of property consisting of horses, professedly for the purpose of paying said mortgaged debt, that said property was left there, but whether it was paid to said Vashni the witness did not know except from the declaration of said Farmery.

To this evidence the defendant objected, but the same was admitted by the court. The plaintiff then proved by the solicitor, who procured the foreclosure that a large amount, to wit: the sum of \$1069 dollars was paid to him by said Farmery, on account of the mortgage before the foreclosure, which was not applied, but

that the decree was taken for the full amount of the notes.

He proved also the declaration of Edward Hemmingway made in the fall of 1829, that there was only between \$300 and \$400 due on the mortgage to Vashni.

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He also proved by the declaration of Jonas Hemmingway made shortly after the deed from Farmery H. to him dated in Sept. 1830, that he, Jonas, was by the agreement with Farmery to pay the mortgage to Vashni, and also the plaintiff's mortgage towards the purchasing of the land; that he retained \$400 dollars to pay the mortgage to Vashni, and if the sum due did not amount to that he was to send the balance to Farmery. It was also proved that Jonas afterwards made a payment of interest to the plaintiff on his mortgage.

The defendants' then offered evidence to prove that at the time of the purchase by Jonas H. of Farmery in Sept. 1830, Farmery deceived Jonas in representing to him that the amount due on the mortgage was less than was actually due. This evidence was objected to and rejected by the court.

The defendants then offered said Edward H. as a witness to prove the fairness of the decree, who was objected to by the plaintiff as interested and his testimony was rejected.

The court charged the jury that the decree having been taken for a much larger amount than was due, and that circumstance having been known at the time both to Edward and his solicitor and no explanation being furnished, the decree was to be regarded as fraudulent as to the plaintiff.

And further, if Jonas Hemmingway agreed upon the occasion of the purchase in Sept. 1830 to pay their mortgage and retained a part of the purchase money for that purpose, that it was not now competent for him or those claiming under him to set up an assignment from Edward as a defence in this suit, but that said assignment must be considered an extinguishment of said mortgage.

To these several decisions and charge the defendants excepted.

*Linsley and Solace for defendants.*—1. The declarations of Farmery Hemmingway were clearly inadmissible, and cannot be distinguished from permitting a man to prove, that he had the money in his pocket, and said he was going to pay a note on mortgage. It is in no sense a part of the *res gestæ*, of the fact necessary to be proved, to wit: the payment of the money. Or further, it only amounts to evidence *tending to prove*, the existence of an intention to pay sometime previous to the time when it is preten-

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ded the payment was made. Proof of the existence of an intention to do a wrongful act, is in criminal law, a familiar principle; but the admitting proof of an *intention* to perform a contract as legitimate evidence of its fulfilment is as novel as it would be dangerous.—Starkie Ev. 47.

2- The court erred in rejecting the testimony showing a fraud practiced by Farmery Hemingway on Jonas. It was indispensable to explain what the plaintiff proved Jonas had said. It is manifest from the case that Jonas in purchasing of Farmery was deceived in relation to the amount due on the Vashni Hemmingway mortgage, and the proof offered would have explained it fully. Suppose Farmery sold Jonas for \$1500 and that he represented that there was but \$400 due on the Vashni Hemmingway mortgage, and that as between Farmery Hemmingway and Jonas it was agreed, that out of the purchase money Jonas should reserve \$400 for the Vashni H. mortgage and enough to pay plaintiff's debt, that acting on the supposition that only \$400 was due Vashni H. he should have paid a number of hundred dollars to Farmery, and afterwards found that there was enough due to V. Hemmingway to swallow up the whole amount of the purchase money originally agreed to be paid. We conceive that no principle of law or equity required Jonas H. to extinguish plaintiff's mortgage. If the contract to pay off the prior incumbrance, had been between Jonas and plaintiff and entered into for a valuable consideration and without any fraud in plaintiff, the question would have required a different consideration. But when the contract is utterly void between the original parties, for fraud, it is beyond our comprehension, how it can be set up by third persons claiming through the perpetration of the fraud; and that too against the man defrauded. No person can compel Jonas to execute the contract beyond what Farmery could have coerced him.

The equitable defence arising out of the misrepresentations of Farmery is as unanswerably applied to others claiming through Farmery, as it would be to him. The purchasing in this prior incumbrance cannot operate to extinguish the mortgage if it would be extinguishable.—*Lockwood vs. S——*, 6 Conn. 373.—*Baldwin vs. Morton*, 2 Conn. 161.—*Marshal vs. Wood et al.*, 5 Vt. R. 250.

3. Jonas H. had a right to purchase in the Vashni H. claim to strengthen his own title. He was not only a mortgagee as well as plaintiff but also a purchaser and will be protected in bringing in a prior incumbrance.—Powel on M. 479-80.

4. But the mortgage was at an end, a foreclosure had taken place, and the title to the land had become absolute in Vashni Hemmingway. Hence a quit claim from Vashni or his heirs conveyed the land itself.

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5. The court erred in rejecting the testimony of Edward Hemmingway. All the interest he ever had he had released to Jonas, and as by the terms of that contract, he had not in any way become answerable for the validity of the title, he had no legal interest in this controversy. The verdict could never be used against him.

6. The court erred in charging the jury that the taking the decree for more than was due was fraudulent. It is indeed suggested in this part of the case, that no explanation was offered, but it will be found from another part of the case that an explanation was offered, but the court declined hearing it. If a party taking a decree or judgment has in his own hands the means of taking the decree or judgment for the true amount, he is bound to do it. But where payments have been made on notes, bonds or other securities, and receipts given the obligee, it is not in his power by neglecting to produce his vouchers, to prevent the plaintiff from obtaining a valid judgment. To impeach such judgment there must be something more than the fact that it is too large. Some fraud must appear.

7. If the foreclosure was invalid yet the debt to V. H. was unpaid, and the original lien remained. The taking a foreclosure for a sum too large would not destroy the right to what was honestly due—as the claim of the heirs of Vashni H. had passed to Jonas, it furnished the same protection to him, that it would have done to them had they taken possession under the claim. It must be conceded that they could not be ejected from the land until the sum actually due them had been paid unless the purchase of this prior incumbrance operates as an extinguishment. It is immaterial in defending this action whether the foreclosure be valid or not.

8. As Jonas had paid off a prior incumbrance effecting plaintiff's title as well as his own, plaintiff cannot take the benefit of such a payment without at least paying Jonas an equitable proportion of the money thus paid out.

*H. Seymour for plaintiff.*—The plaintiff objects to any title derived to the defendant under this old mortgage.

1. That the decree as to the plaintiff was fraudulent.

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2. That if it was not fraudulent the purchasing in of the title under it by Jonas Hemmingway from the heirs of Vashni was an extinguishment of that title, so that it could not be set up by those claiming under Jonas against the plaintiffs title. The fact that Farmery H. was permitted to remain in possession for such a length of time, and the fact that 1069 dollars had been paid by Farmery to the mortgagee's solicitor before the decree and not applied, afforded a strong presumption that the mortgage was satisfied and the decree fraudulent; and to strengthen this presumption, the testimony showing that Farmery had taken property to Massachusetts, professedly for the purpose of paying on the mortgage, was properly admitted by the court Starkie part 2, 241.—19 Johns. 164.—15 Mass. 230.

Jonas Hemmingway was the real party interested in this suit and his declarations at and near the time of his making the purchase of Farmery as to the contract between him and Farmery was proper testimony.—Starkie 1387—1 Esp. 394.—11 East. 584.—Starkie 42, part 4.

The testimony as to Farmery's representing to Jonas that the sum due on the said mortgage was less than was really due was properly rejected. If Jonas chose to rely on Farmery's statement instead of ascertaining the fact for himself, this ought not to effect the plaintiff.

Edward Hemmingway was not a competent witness. A person who has acquired a fraudulent title and fraudulently conveyed the same though by quit-claim is not a competent witness.—Swift's Digest vol. 2, p. 252.—3 Johns. R. 371.

As to the other objection to the defendant's protecting themselves under the old mortgage and decree. The plaintiff insists that admitting the decree to have been a fair and just one, that in the relation defendants stand to plaintiff's title they cannot avail themselves of it.

Farmery Hemmingway the mortgagor (as it was his duty to pay up this mortgage) could not by taking a conveyance from the mortgagee or his heirs have set up this title against his own grantee the plaintiff. Though in form a conveyance, it would in effect be an extinguishment of the mortgage title. Nor could he set up any title inconsistent with his own deed.—Starkie 6, 535, part 4.

Jonas Hemmingway in every respect stands in the same relation to the title that Farmery did. When he purchased of Farmery, a part of the consideration was that Jonas should pay both the bal-



ance due on the old mortgage and the debt due the plaintiff. The money for both these purposes was left in his hands by Farmery. The conveyance to him, therefore, of the title under the old mortgage in its legal effect is an extinguishment of that title.—*Collins vs. Torrey*, 7 Johns. R. 278.—6 Johns. R. 396.—6 Vt. R. 602.

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Another objection if it were necessary, may be made to the defendant's title under the old mortgage. The payments on it, some before and some since the decree have reduced the sum due from 2500 dollars named in the decree, to about 400 dollars. The receiving payments on the debt by the mortgagee has the effect of opening the mortgage to redemption by the mortgagor. The interest of the mortgagee in this mortgage is personal property and goes to the executor or administrator, and no title to the premises passed to the heirs of Vashni Hemmingway.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The plaintiff claims title by virtue of a mortgage deed from Farmery Hemmingway, dated in December 1829. Farmery Hemmingway, in September 1830, conveyed the same premises to Jonas Hemmingway, and by a regular chain of conveyances, the title of Jonas Hemmingway came to the defendants. The defendants attempted to set up a prior title derived to them from the representatives of Vashni Hemmingway, to whom Farmery Hemmingway had mortgaged the premises in May 1814, on which mortgage a decree of foreclosure had been obtained in January 1826. When Jonas Hemmingway purchased of Farmery in September 1830, he agreed to pay both of the mortgages before mentioned, and retained a part of the purchase money for that purpose. The county court decided that, under the circumstances, neither Jonas Hemmingway nor the defendants, who claimed from him, could set up the assignment executed by the representatives of Vashni to them, to defeat the plaintiff. We are of opinion that the views of the county court as expressed in the charge of the judge were correct.

On the first question raised here, as to the admission of the evidence, that Farmery took property to Massachusetts for the purpose of paying the mortgage to Vashni, we think the evidence, in connexion with the declarations of Jonas Hemmingway and the executors of Vashni, was admissible as tending to show a payment of the mortgage after the decree of foreclosure had been made and expired. If payments were made by the mortgagor and ac-

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cepted by the mortgagee after the decree of foreclosure, the estate of the representatives of Vashni would not be considered as absolute under the decree, but remained, as before the decree, conditional. The title of Farmery was therefore not gone from him wholly, when he mortgaged to the plaintiff in 1829, but he had an equity of redemption in the premises in question.

After Farmery executed the deed of mortgage to the plaintiff, he had an estate in the premises, subject to both mortgages. His grantee, Jonas Hemmingway, stood in the same relation in equity, the debtor of the representatives of Vashni Hemmingway and of the plaintiff. Neither Farmery nor Jonas could purchase in one of the mortgages and keep it alive to the prejudice of the other, but a purchase could only operate as a payment. The counsel for the defendants have a mistaken view of the situation of Jonas Hemmingway or the defendants, by considering them as mortgagees without notice, purchasing in a precedent incumbrance to strengthen their title. The only case, where one purchasing under a mortgagor has been permitted to purchase in a prior mortgage and decree under it, is that of a first mortgagee, who has purchased of the mortgagor the equity of redemption. In that case, he has been permitted to claim by virtue of his mortgage against a second mortgagee; and we are not aware that the cases have gone any further. This view of the case would alone be decisive of the rights of the parties to this suit. But when we further take into consideration, that Jonas Hemmingway, when he purchased of Farmery, agreed to pay the mortgage to the plaintiff, and retained a part of the purchase money for that purpose, it shows manifestly the intention of the parties, that the mortgage to Vashni should be paid, and would prevent Jonas and all claiming under him, from setting up that mortgage in any way to the prejudice of the plaintiff; and although this agreement may have been procured by the fraud of Farmery, and he may have been liable therefor, yet it would not change the relation in which Jonas stood to the plaintiff, viz; that of a mortgagor in possession, liable both by law and by express agreement to pay the lien which the plaintiff held on the land by his mortgage deed. The case of *Brown vs. Stead*, 5 Simons R. in chancery 535, is a very conclusive authority on this point. The county court were correct in treating the assignment from the representatives of Vashni Hemmingway to the defendants as an extinguishment of the mortgage.

The other question in relation to the admission of the testimony of Edward Hemmingway, (who, it appears, was one of the exec-

utors of the will of Vashni,) as to the fairness of the decree, became wholly immaterial, when it appeared that, by accepting payment after the decree, and admitting a less sum to be due than the amount stated, the executors waived the benefit of that decree, and held their title as a defeasable one, upon the performance of the condition expressed in the mortgage. The judgment of the county court must therefore be affirmed.

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# RUTLAND COUNTY,

FEBRUARY TERM, 1836.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

" SAMUEL S. PHELPS, }  
" JACOB COLLAMER, } *Assistant Justices.*  
" ISAAC F. REDFIELD, }

## SAWYER and ROGERS vs. JAMES ADAMS.

When a town clerk copies a deed delivered to him for record on a book which has ceased to be a book for recording for a number of years, and does not insert the names in the alphabet, for the purpose of concealment and fraud, such deed is not recorded, and is no notice to after purchasers, or attaching creditors.

This was an action of ejectment commenced at the county court against Cyrus Adams and James Adams. Cyrus Adams suffered a default. But James set up a title under a deed from Cyrus. The cause was passed to this court by exceptions taken by the plaintiff to the charge of the court to the jury on trial below.

The facts in the case are stated by the chief justice in delivering his opinion.

*Mr. Smith for plaintiff.*—We contend the defendant has not procured his mortgage to be recorded in compliance with the statute. The delivery of it to the town clerk and procuring the entry to be made which appears on the back of it was not doing what is necessary to give priority of title. The statute makes no provision for such entry, but on the contrary is explicit, that a deed shall be recorded at full length, and unless so recorded shall only operate between the parties and their heirs.—Stat. chap. 50, no. 1; sec. 20. No. 5; sect. 1 and 2; chap. 18 no. 1; sect 5, 6, 8. Constitution chap. 2, sect. 35.—*Allen vs. Everts*, 3 Vt. R. 10.—*Stewart vs. Henshaw* do. 264.—*Stevens vs. Brown* do. 420.

The recording of the mortgage on the back leaf of the old book of records was a nullity. The object of the statute is notice of conveyance for the security of purchasers. But this record was

secret and wholly inaccessible to any one but the parties. It was an evasion of the statute, and in judgment of law is as no record.

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*Astor vs. Wells* 4 Whet. R. 466. The defendant having had a reasonable time to procure his mortgage to be recorded cannot call upon the court to dispense with the statute unless he shows notice in the plaintiffs' actual or constructive. It is admitted in the case the mortgagor remained in the open and peaceable possession of the premises long after the plaintiffs' attachment. It does not appear the mortgage of the defendant was left with the town clerk and by him kept on file, and nothing is shown on the part of the defendant which would make it necessary for the plaintiffs to inquire after and to take notice of it.

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No foundation is therefore laid for constructive notice, and actual notice not being pretended, the plaintiffs' are *bona fide* purchasers without notice, and their title must prevail.—*Beekman vs. Frost*, 18 John. R. 466.—*Barnes vs. Hawley*, 2 Conn. R. 467.—*Pridge vs. Tyler*, 4 Mass. R. 541.—*Farnsworth vs. Child* do. 637.—*Huntingdon vs. Miner*, 5 Vt. R. 54.—*Skinner vs. McDaniel* do 539.—*Same vs. Same*, 4 Vt. R. 421.

If it be said the defendant ought not to suffer for the wrongful act of the town clerk, all we have to reply is, that he has not procured that to be done which the statute has made necessary to give priority of title.

It is a general rule where a statute directs a thing to be done in a particular way it cannot be done in any other way.—6 Bac. Ab. 337.—1 Swift's Digest 155.—*Metcalf vs. Gillet*, 5 Conn. R. 400. In the case of a party claiming title under a deed from an administrator, executor, or collector, or the levy of an execution, he must show proceedings agreeably to the statute. It is the duty of the court to construe a statute so as to suppress the mischief and advance the remedy. In the absence of notice to give effect to an unregistered deed would defeat the object the legislature had in view in requiring a registry.

It would amount to a repeal of the statute. The defendant must take his remedy against the town clerk, or the town.—Stat. chap. 50, no. 5, sect. 112.

*Messrs. Ormsbee and Royce for defendant.*—We contend that the jury having found the defendant to be entirely free from all fraud or collusion with the town clerk, having also found that he delivered the deed to the town clerk to be recorded, that the town clerk received the same for such purpose, and returned such deed.

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to James Adams as recorded, these facts as it respects James A. constitute a sufficient recording to pass the title to James Adams against all persons whatever.

The law makes certain forms necessary to the passing of the title of real estate—of these some are to be performed by the grantor, some by the grantee, and some by an officer of law.

The grantee in this case has done all in his power, he has left the deed with the proper officer to be completed.

The law presumes that he will do his duty; if he does not he is accountable for damages to all persons aggrieved; but the law never intended to put it in his power to prevent the transfer of real estate.

It is further to be observed in this case, that it is merely a question as to which of the parties shall ultimately call on the town.

In the present case the title of the defendant was the elder title. He was in possession under his deed.

The defendant had accepted his title and being in possession, could not himself proceed to prosecute until eviction, without taking upon himself the burden of establishing both positions, that his deed was bad, and the other party had the better title. In other words he would be called upon to defeat his own title, however detrimental to his own interest it might be.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The plaintiffs, being creditors of Cyrus Adams, attached the premises in question, recovered judgment and levied their execution thereon.

The defendant, James Adams, being in possession of the premises, they commenced their action against James and Cyrus Adams. James set up a title under a mortgage deed from Cyrus of a prior date, duly executed and acknowledged and on which there is a certificate of Cyrus, who was then town clerk, that it was received for record and recorded. On referring to the records it is found that the mortgage deed was recorded on the back leaf of volume third of said records, on which there had been no deeds recorded for upwards of twelve years previous to the time said mortgage purported to be recorded. On the back leaf of the fourth volume of records another deed from Cyrus Adams to James Adams, dated June 3d 1826, was copied as recorded, although the last deeds recorded on that book, were in May 1820. In the fifth volume of the town records there was no record of the deed in question, although it was the book where others, received in June and July 1826, were recorded.

It further appears, there was no paging on the book beyond page 424 nor in the place where the mortgage was copied or recorded. In the alphabet it is found that the names of the parties to this deed are not entered, either as referring to the place where the deed was recorded, or attempted to be recorded, or to any other book or place. It is admitted in the case, that the mortgage deed was secretly and fraudulently recorded by the said Cyrus Adams, who was then town clerk of the town of Middletown, on the back leaf of an old book of records; and it must also be considered as established by the verdict, that James had not consented nor was privy to this fraudulent act of Cyrus Adams, the grantor and town clerk. The whole question is, was this deed of mortgage duly recorded. For, if it was, the plaintiff and all others are bound to recognize it, and are considered in law as having notice of its contents. If it is not duly recorded, and the plaintiffs had no actual notice of its execution and contents; on the principle that a conveyance of a later date duly registered is to have priority to a deed of an earlier date not recorded, the title of the plaintiffs must prevail. In the first place it may be remarked, that an act false and fraudulent is usually considered as no act, but as a mere nullity. The expression, therefore, that the deed was fraudulently recorded, was probably intended as referring only to the intentions and designs of Cyrus Adams; not as expressing that the placing the deed in the book where it was found, was, in itself, a fraudulent act. Without, however, attending particularly to this, it will be proper to enquire what is meant by recording a deed, and what is the object of such a record; and upon the answer to these enquiries it will be determined whether this mortgage has been duly recorded.

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On the first particular, there is but little doubt that recording means the copying of the instrument, to be recorded, into the public records of the town in a book kept for that purpose, by or under the superintendence of the officer appointed therefor. This recording may and does take effect from the time the deed or instrument is delivered to the officer, if it is in due time placed upon the records. The delivery of the deed to a town clerk, or his minute on the same that he has received the same for record, are not the recording; but the record, if completed, is considered as taking effect from that time. Hence, if the deed is by the grantee taken from the possession and custody of the clerk after he has received it, and again returned, the record can only be considered as

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taking effect from the time it was returned. This was decided in a case of *Brush vs. Cook*, in Franklin county Jan. 1824.

Furthermore, the deed must be duly recorded. Hence if the deed, as it appears on the record, contains defects which would render it void, if they existed in the original, although there are no such defects in the original, such deed is treated as not recorded. The cases which have been decided on this principle, *Huntington vs. Cobleigh*, *Skinner et al. vs. McDaniel et al.* in Vermont Reports, are but following the principle decided in Popham's Reports, "that an enrolment remains good, notwithstanding omissions by the clerk, *when the omissions are not that which is of any substance in the deed.*"—Sir Francis Englefields case, Popham 21.

If the town clerk in recording a deed, through accident or design, carelessly or falsely records or describes the boundaries in a deed, so that it would appear to convey but a part of the land conveyed in the original deed, the record would be good only, and considered as notice only of a conveyance of so much as appeared on the record to be conveyed. In the case of *Beckman vs. Frost* 18 Johns. 544, the registry of a mortgage of 3000 as a mortgage of 300 was considered as notice only of an incumbrance for the sum stated in the record. In such cases, the purchaser may be wholly free from fault or negligence. He may deliver his deed to the proper officer and it may be returned to him as recorded, but through accident or design it is not truly recorded. Subsequent purchasers or creditors, having no other means of knowledge of the contents of the deed than by resorting to the records, cannot be considered as having notice of any other conveyance than such as appeared on record.

The object of recording, as has already been noticed, is for the purpose of notice to after purchasers and creditors. In considering what is necessary to complete a record, it will not answer to say that the record may be so made as entirely to defeat the object for which it was designed. The purchaser may fairly deliver his deed to the town clerk. The clerk may return it to him with a regular certificate that it has been recorded; and if he does nothing more; if he does not record it in fact, there is no actual or constructive notice to purchasers of the existence of such deed. The clerk is guilty of fraud, and the person who left the deed for record is deceived; still his deed is not recorded and no title passes thereby, except as against the grantor and his heirs. In such a case there can be no doubt that the purchaser will lose his



title through the fault or fraud of the town clerk. In applying these principles to the case under consideration, we cannot hesitate in saying that the mortgage deed of the defendant has not been recorded, and that the act of the town clerk was as wholly inoperative as if he had written this deed on a slate, or copied it into his family record. The duty of the clerk was plain, to record this deed in the book where he was then recording other deeds; and it seems that he had then recorded as far as the fifth volume or more. Book 3, in which this deed was recorded, was not the book for recording deeds at that time, and had ceased to be so for more than twelve years. It was a book of records full and completed, and not a book in which deeds were thereafter to be placed. Such a record as was attempted by the town clerk was not, and it was designed that it should not be any notice to the creditors of Cyrus Adams, and was as palpable a fraud and as gross a deception as was ever attempted by any man in a public office. The deed was not recorded in a book kept for that purpose, and undoubtedly was kept from the alphabet for the very purpose of deception and concealment. We cannot consider that this deed was recorded according to the letter or spirit of our constitution and laws upon that subject; and unless we admit that a deed may be recorded in any place, where the town clerk may choose for the purpose of concealment and not for notice, and which he may call the records of a town, we must treat this record as a mere nullity. A variety of new cases have been supposed in argument, in which a town clerk might literally perform the duty and yet render his act wholly ineffectual. We cannot say, how ingenious, or corrupt and fraudulent public officers may be in evading the laws; nor are we to suppose that cases may exist more flagrant than the one under consideration. In one of the cases supposed, of the clerk recording a deed and immediately gluing two leaves together, or cutting out the one containing the record, it may not perhaps be material to enquire what would be the effect of such an act. The same thing might be done by any other person. Either of them in such a case would be guilty of forgery and exposed to the penalty of the law therefor. If the deed was actually recorded and the duty enjoined by law done and performed, it is not necessary to declare what would be the effect of such after proceedings; but I can say for myself that, if I believed the town clerk recorded the deed, having at the time the intention to cut it out or efface it as soon as recorded, and did so cut it out or efface it, I should be loth to say that such a deed had ever been recorded. In the case

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supposed, of his keeping weekly books in which he recorded such deeds as he chose, if it was done for no justifiable reason or excuse, but for the purpose of concealment and fraud, it would not and ought not for a moment to be considered as a compliance with the statute.

The result to which we come is, that the mortgage deed has not been recorded; and we do this with less reluctance, as the defendant has a clear and undoubted remedy against the town clerk and against the town, if he has not been in any way a party, or consenting to the fraudulent act of the town clerk. The remedy of the plaintiffs, in the event of a decision the other way, is not so clear. Indeed, if the mortgage of the defendant had been recorded, they had constructive notice, and proceeded with knowledge of the existence of the deed, and probably could have no remedy.

The judgment of the county court is reversed and new trial granted.

PHILPES, J., *dissenting*.—That the proceedings of the town clerk in *this* instance were grossly culpable and illegal, is conceded on all hands. That he was guilty of a flagrant breach of official duty, is equally clear. And it is further conceded, that the tendency, as well as intent, of this breach of duty was to defeat the main purpose of the law, which requires deeds to be recorded. But the question for our consideration is, not whether such irregularity, with the fraudulent purpose attributed to the officer, is to receive the sanction of courts of justice, but it is, what are the particular legal consequences of this official misconduct; who is to be considered as the party primarily injured, and who is entitled to a remedy against the officer, or those responsible for him.

If, on the one hand, we hold that the deed in this instance was not duly recorded, or in a legal sense not recorded at all, the consequence is, that the town clerk is liable to the defendant for his default. If, on the other hand, we hold that the deed was recorded, and the requirement of the statute of conveyances satisfied, then, if the plaintiffs have been injured, by what may be well denominated a fraudulent concealment of this record, they have their remedy, in like manner, against both the town clerk and the town which appointed him.

An attempt has indeed been made to distinguish between the two suppositions. But if the town clerk be responsible at all, for official misconduct to the party injured, it would be difficult, I apprehend, to distinguish between the case of a purchaser, whose deed he had neglected to record, and a purchaser, from whom the

existence of a prior recorded conveyance had been fraudulently concealed. It is the duty of the town clerk, not only to record all deeds committed to his hands for that purpose, but when recorded to show that record to any person who may desire information on the subject. A fraudulent concealment of such record, by which a purchaser is deceived and injured, is most clearly an official default, for which an action will lie. It is true, that the remedy of the plaintiffs, in this instance, might not be so clear, because there is strong reason to suspect that the attachment and levy were a matter of experiment, designed to secure a hopeless debt by superceding the defendants mortgage. If such be the case, the plaintiffs remedy against the town clerk would indeed be doubtful, for the best of all reasons, to wit, the absolute want of all equitable foundation for it.

A concise view of the duties of the town clerk will show, not only that either of these parties might have a remedy against him, according as our decision may be, but will also show that those duties so far as they are due to individuals, and can be made the basis of a remedy by suit, are of a two-fold character.

Those duties are pointed out in the act relating to town meetings and town officers.—Rev. Laws p. 408. Section 20 provides, "That a book or books, with an index or alphabet to the same, suitable for registering deeds, &c., shall be kept in each town in this state." This part of the officer's duty concerns the public alone. "And it is hereby made the duty of the town clerk, or register, truly to record all deeds and conveyance, &c., when by law it becomes necessary." Here is a duty to the party whose deed the law requires to be recorded, and it is clear that, for a default in this respect, he is the only party who can seek a remedy.

The same section provides further, that "if any clerk shall neglect or refuse to record any deed, or conveyance delivered to him to record as aforesaid," (this has reference to the person whose title is evidenced by the deed) "or shall refuse to give any copy of any record, in his possession, or shall, on proper request, refuse to show any record, or file, in his office, the clerk so neglecting, or refusing, shall forfeit and pay," &c. "And shall also be liable for all damages to the party injured, to be recovered," &c.

What is here said, as to giving copies and showing his record, has reference, not to the party whose deed may be recorded, but to others who only can, from the nature of the case, be the party injured.

By the act of Nov. 1816, sec. 2, the several towns are made

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liable to make good all damages, which shall accrue to any person, or persons, by reason of the neglect or default of any town clerk by them appointed.—Rev. Laws p. 490.

Our whole system then on this subject is briefly this. The law, as a matter of convenience and expediency, requires all conveyances of real estate to be recorded in certain offices, thus furnishing a place to which all persons may resort to ascertain the state of the title. And the object of this is to give notice not to the parties to the conveyance, but to strangers. But in order to carry this policy into effect, it becomes necessary to compel the grantee to get his deed recorded, and this is done by rendering the deed inoperative against strangers, unless it be recorded. An officer is appointed in each town for this purpose, whose duty it is, to record all conveyances, and, to secure the party whose deed is required to be recorded, the town clerk is made liable to him, if he neglect to record any deed, and the party is injured. When the deed is recorded, the title is perfected, the town clerk has discharged his duty to the party to the conveyance, who has no further interest in the official duties of the town clerk. But the object of the law is not yet attained. That object is to give notoriety and publicity to the conveyance, and to enable others to ascertain the state of the title; and, for this purpose, the town clerk is required, not only to give copies, but to subject his record to the inspection of every person, and all persons, who shall have occasion to examine it. He is subjected in case of refusal, not only to a penalty, but to all damages to the party aggrieved. Now who is the party aggrieved in this case? Most clearly, not the party whose deed is recorded, but the person who desires a copy, or wishes to examine the title.

In this view of the subject, it is obvious that the clerk has separate and distinct duties to perform. A duty on the one hand to the person whose deed he is required to record, and, a duty on the other hand to the person who finds it necessary to inspect the record. These are separate and distinct. One may be fully discharged and the other not; and if the first be discharged and the rights of the party once established, those rights can not be affected by a failure in the other by which a third person may be injured or defrauded.

It is obvious then that a deed may be so recorded as to satisfy the requirement of the statute of conveyances, and still, through the default or misconduct of the town clerk, the great purpose of the law may not be fulfilled. The legislature so understood it, and

have provided accordingly. They did not suppose that, if full information was not given, to all who might be interested, the title would necessarily be invalid. They have assumed that it would be otherwise, and have provided a remedy for the party injured.

When therefore the court have established the position, that, in this instance, the main purpose of the law has not been answered, that the desired information, or the requisite facilities for information have not been furnished, they have established no more than what was conceded in the outset. They have arrived at the precise point whence they started, but have not advanced a step towards a decision of the question before us.

That question is this. There has been gross misconduct in the officer. In consequence, the law has not been carried into effect, in its spirit and intent. Through that misconduct, the great purpose of the law may not have been answered. Third persons may have been deceived in relation to the estate in question. Now is that misconduct of a character which necessarily vitiates the defendant's title, under his deed, or is it such, as merely subjects the town clerk to damages at the suit of the party injured? In one case our decision must be for the plaintiff, in the other for the defendant.

In my judgment it is a case of the latter kind. The defendant deposited his deed with the town clerk for record. It is recorded at length, and truly. It is recorded in the book, or one of the books, which constitute the record of the titles to lands in the town. There it lies, side by side, with other conveyances, upon the same leaves, and within the same cover, and may be read by any person, who will open the book, at the right place; and he could read no other, which is there recorded, if he did not. It is a part of that record now, and will remain so while the record itself shall last. Where then is the difficulty? Why, there is an anachronism in the record. The deed is recorded with others of a more ancient date, and not in juxtaposition with others of a contemporaneous date. What then. Is it not nevertheless a part of the record? Can any distinction be taken between this leaf and the preceding? It is the *back leaf*. Well, if it be not a part of the record, for that reason, tear it out, and let the next, and the next, in succession, be obliterated or expunged, for the same reason.

But the deed is so placed, in relation to others of a contemporaneous date, that a person, examining the record, in the usual manner of a partial examination merely, would not probably discover it; and this with a design, on the part of the town clerk, that it

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should escape observation. This is the whole complaint. But in the first place, I do not see how the fraudulent purpose, or intent of the officer, should affect the question whether the deed be recorded or not. It is there, in the book, and can be found by any person, who will examine the whole record. It is intimated that a fraudulent act is a void act, and with this view this is called a fraudulent recording. But it is impossible to predicate fraud of the mere act of recording. The fraud, if any, must consist in the transposition of the record, for the purpose of concealment. And if there be fraud in the measure adopted, to prevent those examining the record from discovering the deed, it is beyond my comprehension to understand how the maxim, that a fraudulent act is a void act, can apply.

In the next place, I admit, that the fraudulent purpose of the town clerk would subject him to an action, at the suit of any injured party, but I can not conceive how any such measure should affect the validity of the title. Suppose the plaintiffs in this case had examined the record, before making their attachment, and had discovered the record of the deed in question; are we prepared to hold the record void, and the title defective, simply because the town clerk did not intend they should discover it? Or suppose another creditor had done so, should we hold the title good as to him and void as against the plaintiffs? Yet our decision carries with it that consequence. Nor can we avoid that consequence, by the suggestion, that the plaintiffs would, in that case, have notice of the deed, which we all understand is equivalent to its being recorded. By the very supposition, the plaintiffs would derive notice from the record alone.

Now if the record be a nullity, how can it operate as notice to any one? And if it be held good, as to all who might actually have knowledge of it, the controversy is at an end, it is not void; and it would be absurd to hold it bad, because others might not discover it.

It is very clear that if a record of a deed is illegal and void, knowledge of such void record is not legal notice of the existence of the original deed. If then we hold this record to be void, we must also hold it ineffectual, although the particular deed thus spread upon the record, may have been exhibited and specifically pointed out to the plaintiffs before they made their attachment. The absurdity of such a decision is most glaring, when we consider, that the gist of the complaint in the case is the supposed attempt at concealment.

From the very nature of the supposed fraud, therefore, it would

not, in my judgment; operate to avoid the defendant's title; but might subject the town clerk to damages, if the plaintiffs were actually injured.

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I can see no equity in the plaintiffs' case. They seek to set aside the defendant's mortgage, who is a *bona fide* creditor, having a prior specific lien on the property in question, and this, simply upon the ground of the irregularity in the record of the mortgage. How are they affected by that irregularity? If they examined the record, and there found the defendant's mortgage, how are they injured? Was it of any consequence to them, whether it was found on one page or another? If they did not examine, but attached at random, as is generally done where a debtor becomes notoriously insolvent, of what moment is it, whether they could have discovered this mortgage with greater or less facility, if they had searched for it. If they did examine, and were misled by the act of the town clerk, they have their remedy against him. Upon this point, I may add, that the statute above cited, which subjects the town clerk to damages, for refusing to show any record or file in his office, is, so far as it gives a remedy to the party aggrieved, a remedial statute, and as such is to be construed liberally. A fraudulent concealment of a record would unquestionably be considered within the spirit of the law, and equivalent to a refusal to show it. Indeed if there were doubt on this point, there can be none that an action would lie at common law, independently of the statute.

If therefore the plaintiffs are entitled to recover, it must be upon the ground of strict law, and upon the ground that the defendants title under his mortgage is defective, for want of recording.

Has the mortgage been recorded, agreeably to the requirement of the statute of conveyances?

On this point I premise, that the case of mis-recording a deed, is altogether different from the one under consideration. Thus, in the case of *Beckman vs. Frost*, 18 John. 544, a mortgage for \$2000 was recorded as a mortgage for \$300. The record was held to be notice only of a mortgage for the smaller sum. This decision necessarily grew out of the very principle of the recording system. If the purchaser could not rely on the record, the record was worse than useless; it was a means of deception. But how does the principle of that case bear upon the question before us? In such a case, I admit the town clerk would be liable to the mortgagee because he had not discharged his duty to him, in not recording his mortgage correctly. But does it follow that such

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would be the case, if the mortgage were truly recorded, but the town clerk had deceived a subsequent purchaser, by suppressing or concealing the record?

By the 36th section of our Constitution, it is provided, that "all deeds and conveyances of land, shall be recorded in the town clerk's office in their respective towns, and, for want thereof, in the county clerk's office of the same county."

By the 5th section of the act relating to conveyances, (Rev. Laws p. 167,) it is required, that deeds of lands be "recorded at length in the clerk's office of the town, in which such lands &c. lie." These two provisions contain the whole law which requires a recording of the deed in question, and, in connexion with the statutes before cited, relating to the duty of town clerks, all the statutory provision bearing upon the question under discussion. All that is here required is, that the deed shall be recorded at length in the town clerk's office. I find nothing here, as to the order in which deeds shall be recorded, whether in the exact order in which they may be received, nor do I find any direction, as to how many books shall be used at a time. Nor is there any restriction as to recording any particular deed, in the book, in which the clerk may then be recording other deeds. Every thing concerning the systematic arrangement of the records, with a view to convenience of reference, is left to the discretion of the officer, under the sanction of his official responsibility.

I admit that the deed must be recorded at length, in a book, which is already, or which becomes upon the recording of the deed, legally a part of the record of land titles in the town. But when this is done, I hold the title to be perfected. I can not admit that the town clerk is thereafter to be regarded as the agent of the party, whose deed is recorded, for the purpose of giving notice of the deed, nor that the party is responsible for the officer's doings. Hence, if the town clerk should afterwards obliterate, obscure, or even tear out the record, it would not, in my apprehension, defeat the title. It is said that this would subject the party to the penalty of forgery. What then? Would the title be affected? Suppose the clerk should destroy his alphabet, which would render it necessary to examine the whole record in course, could it be said that the record would be rendered null and the titles defeated?

It is said that the town clerk should have recorded this deed, in the book in which he was then recording other deeds. I admit the propriety of this rule, as directory merely; but I can not agree, that, if his book be full, and a new one procured, the first deed



recorded in it is not legally recorded; nor that the validity of the record would depend upon the subsequent recording of other deeds in the same book. Cases indeed may, and have occurred, where a book has been laid by, and afterwards resumed; yet it never was suspected, that such a proceeding vitiated the record. It appears to me, that if the book be appropriated to the purpose of recording deeds and no other, that it may legally be used for that purpose, so long as a space is left to be occupied; and I do not understand what is meant, when it is said, that it is not a book kept for that purpose. Suppose a book is in use, but the town clerk, not liking the shape, or the quality of the paper, ceases to record in it, and procures another; a subsequent clerk, not so fastidious, resumes the old book and fills it; now is the first deed thus recorded in the old book duly recorded? If not so originally, when does it become so? How many deeds must be thus recorded to give the proceeding validity?

The objection in this case resolves itself into this. The order of time was not observed. Does this vitiate the record? I apprehend not. It might deceive a person examining the record, and it might not, and it is for this reason, that I hold the record sufficient to give effect to the deed, leaving it to the person who may be misled, to seek his remedy.

I have already remarked, that, in my opinion, a deed may be so recorded, as to give full effect to it, and yet the great object of the statute, the giving notice to third persons, may be defeated, as respects particular persons; and that the remedy for the person deceived, is by action against the town clerk, and not by avoiding the title. I consider this a case of that description, because the irregularity complained of does not necessarily defeat the object of the law. Whether that purpose is answered or not, in any particular case, depends altogether upon the degree of vigilance in the person inspecting the record. He might discover it and he might not. It will not do to say that this record *could* not be found, because it could not be found with the same facility, as if the proper order of recording had been observed. It appears to me that the fallacy of the argument adopted by the court, consists in not observing the distinction, obviously created by the statute, between the duty which the town clerk owes to the person, whose deed he records, and his duty to others; and in considering the grantee responsible for the misconduct of the clerk, in regard to subsequent purchasers.

I do not contend, that the certificate of the clerk, that a deed is recorded, which is not in fact so, is of any avail; but I do not see

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how it follows, from this concession, that, if the deed be actually recorded, the record is null, simply because it can not be found with the usual facility. Nor can I conceive how it is made out, that the recording a deed in a book exclusively devoted to that purpose, and which has for years constituted a legitimate portion of the town record, and must ever remain so, is equivalent to recording it upon a slate, or family record, which can, under no circumstances, be considered a part of the record, and is never resorted to for such purpose.

In short, I find this deed recorded at length, and truly recorded, in the office of the town clerk under the direction of that officer, and in a book appropriated to that purpose, and no other, which is to every purpose and in the strictest sense a part of the record of the titles to land in that town, a book to which all concerned, resort to ascertain those titles, a book kept for the purpose of exhibiting those titles to the world, and I may add, kept for the purpose of recording deeds in the discretion of the clerk, so long as space is left in it to be occupied. I think therefore, that the statute of conveyances is complied with.

I find, indeed, that it is not the book into which the clerk, at the period of recording this deed usually transcribed his deeds. But I do not deem this essential, for I am not prepared to hold this circumstance, nor the fact that the proper order of recording, was not observed to be fatal to the party's title, which can not be made to depend upon the systematic arrangement of the record, or the facilities afforded for examination.

I find further from the case, that the proper order of recording was disregarded by the officer with a fraudulent purpose, and that the proceeding is objectionable as it tends to conceal the deed from those interested in having knowledge of it. But, I consider this as a breach of duty in the keeper of the public records, towards those who may have occasion to inspect them—and this fraudulent intent and fraudulent tendency, as a proper subject of judicial consideration, only in the contingency that some person is injured who seeks compensation for the injury. If they have injured no one, I see not how the defendant's title can be vitiated by a culpable intent merely in a public officer, or an abortive attempt to defraud.

I feel a repugnance, on other grounds, to deciding this case for the plaintiff. Enough appears, to show satisfactorily that the debtor of these parties, the town clerk, must be wholly insolvent. If it were not so, this controversy would not have arisen. The consequences of our decision must therefore fall upon the town.

They must indemnify the defendant, and are thus made responsible indirectly for the plaintiff's debt. Now, before this is done, I wish to know, whether the plaintiffs have been injured by the misconduct of the town clerk. Let them bring their suit, and let it be made to appear whether they inspected the records, or applied to the clerk for information. If they did not, but attached at random, then they are not injured, and have no cause of complaint. If they did, and were advised of the mortgage, and of the manner in which it was recorded, the case is the same, and the town should not be made responsible. If they applied and were misled, let them show it, and recover for what they have suffered. But in the course we are taking, they are relieved from the burthen of this proof. We set aside the defendant's mortgage, upon the ground, that the plaintiffs may have been injured, without knowing whether they have been so in fact or not; and we cast it upon the town to indemnify the defendant, without giving them an opportunity to examine and contest the question, whether the plaintiffs, for whose benefit this is done, have any reason to complain, either of the town, or its agent.

Entertaining these views, I have thought it my duty to express them, and I do so the more readily, as I am authorized by our associate, who is now absent, (Justice Royce,) to say that he concurs with me, in the opinion I have expressed.

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ISAAC D. SWEAT vs. PETER HALL.

RUTLAND,  
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1836.

A promissory note, executed by a husband to his wife, during coverture, is void, and can not be enforced, even for the benefit, and in the name of a third person, to whom the husband has afterwards promised to pay it.

This was an action on note, made payable to Margaret Hall or bearer, and sued in the name of Sweat the bearer. The note in question was given, to take up a note given originally to Margaret Hall, the wife of Peter Hall; and the plaintiff offered evidence, tending to prove, that the note was given for the separate and individual property of the said Margaret, which came to her during coverture—that at the time the first note was given, the defendant expressed his wish and intention so to do the business, that the said Margaret would have the entire control of the said note, and that he, the defendant, in taking the property for which said note was given, intended to take it only as the agent of said Margaret. The defendant also offered evidence tending to prove that at the time of making the

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second note in substitution of the first, that the same intention was expressed by the defendant. That Margaret Hall had always had the keeping of the note, either by herself or by some friend. That prior to the decease of said Margaret, the note had passed into the possession of and became the property of the present plaintiff; and that after the note was in possession of the plaintiff, the defendant promised to pay the same to him, which promise was made after the death of the said Margaret. This evidence was rejected by the court. Whereupon the plaintiff became non-suit with leave to move in the supreme court that the same be set aside. It appeared that when both the notes mentioned above were given, the said Margaret Hall was the lawful wife of the defendant.

*Argument for plaintiff.*—The case shows that the property in question was always treated by the husband as the separate property of the wife, and that she intended it should be hers.

Equity will protect the separate property of the wife.—Reeve's Domestic Relations p. 91.

At all events, the husband was under a strict moral obligation to permit the wife to have the entire separate control and use of this property. Under such circumstances the moral obligation was a sufficient consideration for an express promise.—4 Vt. R. 572.

*Argument for defendant.*—The defendant insists that as the note in question was executed by the defendant to Margaret Hall, the payee, during her coverture with him, it was absolutely void. That a *feme* during her coverture has no will of her own, no power to contract.—D. Chip. R. p. 300, *Ward vs. Morrill and Ward*.

2. That although the defendant received of said Margaret the amount of said note in money at the time it was executed, yet by virtue of his marriage to her, the money was his own; there was therefore no consideration for the promise declared on.—Reeve's Domestic Relations, p. 1, 86, 88, 89.

3. That the defendant has a right to make any defence which he could have made if the action had been in the name of Margaret Hall.—Stat p. 144.

The opinion of the court was delivered by

PHELPS, J.—This is the case of a promissory note, executed by a husband to his wife, during coverture, and the question is, Is it valid?

It is a general rule that husband and wife are incapable of con-

tracting with each other during coverture, and we are not aware of any case, in which such a contract can be enforced at law.

There are, indeed, cases where such a contract would be enforced in equity, as where it is in compliance with an antenuptial agreement. And it is possible, that, even in this case, if the consideration of the note were the separate property of the wife, that a court of equity would enforce the contract.

But at law, the personal property of the wife vests absolutely in the husband upon the marriage; and no contract, made during coverture, would be regarded, except so far as it might result from an antenuptial agreement, which the law would recognize.

An agreement made between husband and wife, before marriage, will sometimes be enforced after the coverture is determined, as where the contract is entered into, in contemplation of marriage, and with a view to secure to the wife a benefit, to be enjoyed after the coverture ceases. Such was the case of *Palmer vs. Newell*, decided in Chittenden county, where an agreement of this kind, intended to secure to the wife her separate estate, was enforced, after her decease.

But in this case, the contract, if sustained and enforced at all, must be so, upon the ground that it is good and valid in itself, and upon the general capacity of the husband and wife to contract with each other. There is no such capacity, except under peculiar circumstances, which do not exist here, and the note can not be supported.

Nor can the after promise of the defendant vary the case; as the note, being absolute void, can not be set by any after recognition. Such a promise might confirm a *voidable* security, or amount of a waiver of some particular ground of defence.

Whether, if the declaration had counted upon the subsequent promise as the principal ground of recovery, the case would have presented a different consideration to sustain the promise, is a question which we are not called upon to decide.

Judgment affirmed.

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CYRUS ADAMS vs. THEODORE NEWELL, HORACE CLARK, Trustees.

The money of a pensioner, in the hands of his agent, or attorney, appointed to receive his pension from the disbursing agent, and received on that account, is not liable to a trustee process.

This was a factorizing or trustee process, brought against Clark as trustee of Newell.

Clark stated in his disclosure, that he had in his hands, at the time of the process being served, the sum of forty dollars, which he had received of the agent for paying pensions in this state, as the amount due to Newell, who was a pensioner of the United States; which sum he received as the special attorney of Newell for that purpose, and which had not been paid over.

The county court held, that the pension money, thus situated, was not liable to attachment by this process, and adjudged that Clark was not trustee.

To this decision the plaintiff accepted.

After argument by *O. Clark* for plaintiff, and *Ormsbee* for defendant, the opinion of the court was delivered by,

PHELPS, J.—There may be some doubt, how far a pension may be followed, to the purpose of protecting it from the process of creditors, under the act of Congress. Whether that act would protect it after it is reduced to possession by the pensioner, is a question which we are not called upon to decide. Certain it is, that it is protected so long as it retains the distinctive character of a pension. The money, in this case, came to the hands of Clarke, as the attorney of Newell for the purpose of receiving the pension from the disbursing officer of the government, and had not reached its destination. Whatever construction is given to the act, it seems necessary at all events, to protect the fund until it reaches the pensioner. Here it was in transitu, and of course within the protection of the act.

It was well argued, that the pension is a gratuity from the government, and intended for the support and comfort of the pensioner. This consideration shows the propriety of a liberal construction of the act, in carrying into effect the benovolent purpose of the government. Creditors have no equitable claim to the fund, but must rely, if they would seize it, upon strict legal right.

Any other construction than that which we give, would render the provision in question nugatory, and defeat its purpose. It is not supposed that the disbursing officer of the government can be summoned as trustee, independantly of this provision; and if the special agent or attorney of the pensioner is subject to the process,

it is difficult to conceive a case where the provision applies. At the same time, such a decision would enable creditors to intercept the bounty of the government, and defeat the obvious purpose of the law. The judgment of the county court must be affirmed.

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It was further suggested that Newell the principal debtor had deceased since the judgment below.

But, *By the court*—It is the common practice to affirm or reverse the judgment, *nunc pro tunc* in such case. Besides, an administrator may always defend or prosecute a pending writ of error.

Judgment affirmed.

### HART and CARD vs. ORANGE GREEN.

RUTLAND,  
February,  
1836.

If a note be made payable at a particular place, a presentment and demand are not necessary, to entitle the holder to recover against the maker.

This was an action on note, dated Jan. 4, 1834, at Danby, and made payable to the order of the plaintiffs in nine months from date, at the Bank of Manchester. The declaration is in common form describing the note as payable at the Bank of Manchester, without averring, that it was presented for payment at the time and place. To this, declaration there was a demurrer, and the court overruled the demurrer and gave judgment for the plaintiff.

To this decision exception was taken by defendant, and the only question raised was, whether in a declaration on note, payable at a particular place, it is necessary to aver and prove presentment at the time and place.

*Merrill and Ormsbee for defendant.*—When the place of payment is fixed in the note, it is necessary for the holder to recover upon the note, to present it at the time and place when and where it is made payable.

If such presentation is necessary, it must be averred in the declaration, and without such an averment, the declaration is demurrable.—4 Vt. R. 313, *Eastman vs. Potter* and cases there cited.—*Aldis and Gadcomb vs. Johnson*, 1 Vt. R. 136.—*Sanderson vs. Barnes*, 14 East. 500.—*Dickinson vs. Barnes*, 16 East. 110.

*R. H. Waller for plaintiff.*—By the English practice it has been considered necessary before any legislation on the subject, to aver and prove presentment at the time and place of payment; but now by the 1st and 2d stat. Geo. IV, chapt. 78, bills of ex-

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change, accepted payable at a particular place, are regarded as general acceptances, and a demand is good any where unless it be expressly qualified by the acceptance that the bill is to be paid at a particular place and *not elsewhere*. The distinction taken between promissory notes and bills of exchange payable at a particular place, was done away by a decision in the House of Lords which gave rise to this statute.—Notes to 3 Kent's Com. p. 64, 69 70.

In the state of New York, in *Wolcott vs. ———*, 17 John. R. 248, and 8 Cowen R. *Caldwell vs. Cassidy* 271, it has been decided that though a bill or note be made payable at a particular place, it is not requisite for the holder to aver or prove demand of payment at the place.—3 Kent's Com. p. 66. See also a decision in the supreme court of the U. S., *Bank of the United States vs. Smith*, 11 Wheat. R. 171, where this principle is virtually recognized, though the point was not directly in issue. And why should a demand at the time and place be averred in this case any more than if the note had been payable directly to the Bank of Manchester, or directly to an individual in Manchester? Where a note is made payable to an individual, his residence is supposed to be the place of payment, and if the note on the face of it is not payable on demand at his residence, a demand need not be made. This note is not payable on demand at the Bank of Manchester; but is payable in nine months from date at Manchester. The rule of practice in this state is, that where a note is payable at a particular time and place, it is the duty of the maker of the note to be there to pay it, and no formal demand is necessary. This question has never been directly decided by the supreme court of this state, and it is of importance that the law on this subject should be fixed and certain. And if there was no reason for the distinction between a note payable at a particular place and a bill of exchange accepted, payable at a particular place, it is believed that the distinction between a note payable to A. B. at the Bank of Manchester and one payable to the Bank of Manchester as respects the pleadings, is equally unfounded.

If the defendant has deposited or tendered money he can avail himself of that as a defence; whereas on a demurrer, he admits all the facts necessary to charge him and suspends the administration of justice upon a mere technicality when it can be as substantially and more certainly administered without it.

The opinion of the court was delivered by

PHELPS, J.—The only question raised in this case, is, whether it was necessary to aver a presentment of the note in question, at



the Bank of Manchester where it was made payable, and a demand of payment there. This could be necessary, only upon the assumption that a presentment there was necessary, as a condition precedent to the plaintiff's right of recovery.

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Upon this question as to the necessity of such presentment, which has been much litigated, there has been great diversity of opinion, the King's Bench in England holding one way, and the Common Pleas another. The controversy was carried into the House of Lords where a final decision was had, establishing the necessity of a presentment, and this was followed by an act of Parliament, dispensing with it. In the state of New York it has been held, by the supreme court that a demand at the place of payment was not necessary. And this in our judgment is the better opinion.

Without involving ourselves in the abstruse reasoning on this subject, it is sufficient to say, that we regard the note as designating a place of payment, and, so far as this designation is of any practical importance, we are disposed to give effect to it. The promise is to pay money at the Bank of Manchester. An omission to pay at that place, is a breach of the contract. But while on the one hand, a presentment of the note there is not necessary, to enable the defendant to perform, so, on the other, it is not necessary in order to ascertain whether the money has been deposited there. The defendant may have made the note payable there for his own convenience. If so, he may deposit the money there, and his promise is performed. There is no doubt that he could avail himself of such deposit, as either a payment or tender. If he do not leave the money, he, by his own act, renders a presentment there unnecessary and nugatory. On the other hand, the plaintiff if he sue without such presentment, sues at his peril. If the money have been deposited there the contract is satisfied; and, if not, the debt is unpaid, and he is entitled to recover.

The only practical importance, therefore, which we can attach to this designation is, that it enables the defendant to pay at that place, if he chooses, if not, his contract is broken, and he is liable to a suit.

It would do violence to the contract to hold, that a presentment, on the precise day when the note became payable, was necessary.

This would render the promise conditional instead of absolute and in strictness the debt would be lost if the condition precedent is not performed. Such could not have been the intent of the parties. The debt is payable absolutely. The place of pay-

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ment is a matter of convenience. We think every rational purpose is answered by this view of the subject, and, as between the original parties, we think no presentment is necessary.

The rule would doubtless be different as between endorser and endorsee, for their presentment and demand are in the nature of a condition precedent. Judgment affirmed.

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ERASTUS BROMLEY vs. ARWIN HUTCHINS.

The sheriff of another state cannot pursue and retake in this state a prisoner who has escaped from his custody, on civil process.

This was an action of assault and battery. The defendant justified as the servant of the sheriff of the county of Washington in the state of New York ; insisting in his plea that the said sheriff having a regular writ of *capias ad respondendum* against the present plaintiff, arrested him in said Washington county, whence he escaped into Danby in this state, where the sheriff immediately pursued him and took him, the defendant acting as his servant. To this plea there was a demurrer and joinder. The county court sustained the demurrer and rendered judgment for the plaintiff. The defendant filed exception, and the cause passed to this court.

*Argument for the defendant.*—1. The sheriff has a right to retake on fresh suit.—3 Black. Com. 415.—3 Baylie's Index, 301,—2 Swift's Sys. 113.—2 Esp. N. P. 611.—1 Swift's Dig. 543.

2. In this case he made fresh suit.—Rol. Abr. 809.—Dalt. Shff. 562.—2 Bac. Abr. 247—8.—2 Swift's Sys. 113.—2 Esp. N. P. 611.

3. Any person may assist him.—4 Bac. Abr. 442.—Dalt. Shff. 117.—1 Esp. N. P. 412.—Big. Dig. 84.

4. He may retake out of his county and state.—4 Bac. Abr. 435.—Dalt. Sheff. 23.—2 Swift's Sys. 113.—1 Root. R. 107, *Howard vs. Lyon*.—2 Esp. N. P. 611.—7 John. R. 155.

The sheriff *arrested* in virtue of process ; and having arrested, he thereby acquired a right to *detain* the prisoner in custody, and the prisoner having *escaped*, the sheriff, in consequence of his right to detain, has the right to *recapture*.

The case is analogous to that of bail.—Westinghouse's case, B. C. 1820.—*Nichols vs. Ingersol*, 7 John. R. 145.—5 Day's Esp.

N. P. R. 172, note.—1 Swift's Dig. 597.—2 Show. 202.—3 Vin. 498.—6 Mod. 231.—1 Atk. 237.—Show. 214.

It is analogous to *Utley vs. Smith*, July term 1835.

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The opinion of the court was delivered by

COLLAMER, J.—Were this a question of mere recapture 'on fresh suit, it would be of simple solution. As the duty of protection on the part of the government is the correlative of allegiance on the part of the citizen, it becomes a grave question, whether this duty can be performed by the court of justice and other functionaries of our government, if our citizens are at the same time subject to the authority of the officers of another government, over whom we have no control, and who owe to us no official responsibility. It is obvious that all those authorities which go to settle that recapture on fresh suit may be made in another county of the same nation, tend little to settle this question. The case in Connecticut as reported in Root, lends no assistance; as in that case the warrant was sanctioned and endorsed by the authority of the state in which it was ultimately executed. It is however urged that by the case, (*Nichols vs. Ingersoll*, 7 John. R. 155,) it is decided that bail have a right to arrest the principal in another state. From this it is concluded that an officer may do the same. In relation to that case it is to be observed, that it is understood not to be recognized as law in New York, as some of our citizens have had sad occasion to know. It may be true, though not yet so decided, that inasmuch as the bail is the keeper of the principal *at his own request*, and is said to hold him as by a string, and may generally circumscribe or enlarge his wanderings, and may arrest even after a voluntary enlargement, he might by virtue of this power and right existing by contract and licence between the parties, even arrest in another state. The condition of an officer is entirely different. His power is derived wholly from his official character and his precept, and must on principle cease where his official character and precept cease to have validity and jurisdiction. The same may be said of the analogy mistakenly attempted to be drawn from a right acquired to property, by contract or the laws of the country in which it is situate, remaining good elsewhere.

Every government owes protection to its citizens and sojourners, who cannot be forcibly taken out of its jurisdiction without the consent of the constituted authorities. For this purpose each state is a sovereign government and so important and absolute was this considered that in the 2d sec. of the 4th art. of the United

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States constitution provision is made that *felons and fugitives from justice* are to be surrendered; but even this is to be done only on application to the executive. If our citizens are subject to be taken by the officers of a *neighboring* state they are equally subject to be taken and transported to Louisiana or Missouri. Except in those delegations of power invested in the general government and those restrictions provided in the United States constitution, each state is a national sovereignty and holds the same relation to the other states which it holds to other nations. As the United States constitution contains no provision on this subject, our citizens are as much subject to the authority and pretended recapture by the officers of England or France as of New York. This suggests consequences entirely at war with all civil liberty, protection and national independence. We are entirely unprepared to adopt so dangerous and fearful a principle and practice as that for which the defendant here contends.

Judgment affirmed.

*Dexter for plaintiff.*

*Harman for defendant.*

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#### PAWLET vs. NORTH HERO.

Where an order of removal of a pauper had been made and the pauper removed, but the time for taking an appeal had not transpired; it is competent for the overseers of the poor of the two towns, by mutual consent, to abandon the said proceeding, take back said pauper, and thus place all things as if said order had not been made.

This was an order of removal of one Geer, a pauper, from Pawlet to North Hero; from which order North Hero appealed, and pleaded that the town of North Hero was not the place of legal settlement of said Geer. On the trial before the county court no other evidence of said Geer having settlement in North Hero was given but the following, to wit: In January 1834 said Geer was by an order of two justices removed as a pauper from the town of Williston to the town of North Hero, and there left with the overseer of the poor, together with a duly certified copy of the warrant of removal, but no copy of the order was left as required by the act of 1817. In a few days and before the time for taking an appeal had expired, the overseers of the poor of Williston and North Hero had a meeting, when it was mutually agreed that Williston should take back said Geer, pay his expen-

ses at North Hero, and said order should be abandoned and no further proceeding had thereon or claim made by virtue thereof by either party; and it was so conducted accordingly. Upon these facts the county court rendered judgment for the defendant; whereupon the plaintiff filed exceptions and the cause passed to this court.

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*Argument for the plaintiff.*—1. The order of removal from Williston to North Hero, having been executed by removal, and no appeal taken, the pauper's settlement has become fixed in the latter place.—2 Salk. 481-2.—2 John. R. 105.—2 Salk. 488-9, 492, 527.—*The King vs. Hinxworth*, Cald. Contin. 42.—*The King vs. Towchester*, note, 2 Strange 1172.—*Paris vs. Hiram*, 12 Mass. 262.—*Westminster vs. Barnardstown*, 8 Mass. 104.

2. It is true, that notice must be given; (Bray. 177, *Fairfield vs. St. Albans*;) but in this case, it was given by leaving a copy &c. This notice was all that was necessary to enable the defendants to appeal. See *Hartland vs. Williamstown*, 1 Aik. R. 252.—*Bradford vs. Corinth*, 1 Aik. R. 293.

The statute of 1817, requiring an attested copy of the order of removal to be delivered, is merely directory.

The want of such copy cannot render the order void, if a removal have taken place.

The notice was sufficient, and the attested copy could add nothing.—*Barre vs. Morristown*, 4 Vt. R. 584.

3. There is no case known of any order unappealed from being overruled, or declared or considered void, if notice were given and removal made. And, whatever may be the defects of an order, upon which execution has been done, and notice given, it is conclusive upon every body, so far as it extends, and can be understood; if no appeal be taken and reversal had.—*Hartland vs. Williamstown*, 1 Aik. R. 241 to 252, and the cases cited by Marsh.—*Rex vs. Steatford*, 7 Tr. R. 596.—Cald. Contin. 42.

And even on *certiorari*, the court will not set aside such an order, for such cause—appeal is the only remedy.

This court have decided, (*Bradford vs. Corinth*, 1 Aik. R. 290,) that where a town appeals within thirty days, next after the order of removal was made, if no copy, attested by the justices, has been delivered, they waive their right to such copy. Of course, then, the proceeding cannot be void, by reason of such copy not having been left.—1 Aik. R. 252.—2 Aik. R. 186.

4. Neither the statute of 1797 nor that of 1817 requires any

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particular *form* or *manner* of *notice*. The statutes do not enact that "*notice* shall be given in the one case by leaving a copy of the warrant," and, in the other, "by a copy of the order." But merely that such copies shall be delivered. And the court must adjudge *what* amounts to sufficient *notice*.

5. The proceeding is a judicial one—the order is a judgment of a court; and though a party cannot be concluded without notice, yet the statutes having prescribed no *form* of *notice*, or what shall amount to notice, it is for the court to see that the defendant be not wronged—and surely, in this case, the fact of having the pauper to support, and receiving a copy of the warrant of removal was sufficient notice to have put the defendant in motion.—1 Aik. R. 290, 252.—2 Aik. R. 188.—4 Vt. R. 584.

An order of justices, being a judicial act, is not absolutely void, but voidable only, and continues to be an order till it is avoided.—2 Salk. 674, *Hull vs. Briggs*.

6. In the case of *Strafford vs. Hartland*, 2 Vt. R. 565, the court decided, that an appeal must be taken to the next term after a copy of the order was left, if there be sufficient time, though no removal be made under several months. Now the act of 1797 is not repealed, and the copy required by that statute must still be delivered—and, as neither such copy, nor that prescribed by the act of 1817, nor both together, are made sufficient notice, by statute, it follows from this decision, that either is sufficient notice: And, in fact, the case above cited, decides the copy under the act of 1817, to be sufficient notice to oblige the defendant to appeal; while the case of *Hartland vs. Williamstown*, 1 Aik. R. 252, decides the copy under that of 1797 to be sufficient for the same purpose.—*Bradford vs. Corinth*, 1 Aik. R. 293.

Whatever might have been considered of this order, on appeal, it is now too late to call in question its validity—it is now conclusive upon North Hero.—12 Mass. 262.—8 Mass. 104.—7 Tr. R. 596.—3 Vt. R. 370.

It results from the determination in *Strafford vs. Hartland*, that either copy is sufficient legal notice. If a removal were made, and copy left by the officer, ten or twenty days before the next term of the court, could it be doubted that the defendant town would at its peril, be obliged to appeal to such next term, though the justices should not deliver their copy till afterwards? Certainly not—for the statute expressly requires the appeal to be so taken; and in accordance with the statute is the case of *Bradford vs. Corinth*, before cited.

7. The statute of 1817 is simply remedial. The rule in case of remedial statutes is *so to construe them as to cure the mischief and to advance the remedy, and no farther*. The mischief under the statute of 1797 was, that there was no mode pointed out for giving notice, nor any thing required to be done which would amount to notice, except in cases of actual removal. The remedy to be provided was, to define expressly, the nature and form of notice to be given, in the case of an order of removal, not executed by actual removal, or, to require the performance of some act, which would amount to full and complete notice. The act in question contains the latter provision.

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8. This case is not between the original parties, but *inter alia*; in cases like the present, the difficulties of ascertaining whether the copy under the act of 1817 has been delivered, are numerous—while the fact of that under the act of 1797 having been left, always appears of record.

II. The settlement of the pauper cannot be affected, by the agreement between the overseers of the poor of the town of Williston and North Hero, which was made in this case. It is not in the power of overseers, or of another person, to do away the effect of an order of removal, except in the manner prescribed by law—namely, by appeal, by certiorari, or by calling it in question collaterally, and impeaching its validity, on the ground of its being void, through defect of notice, or want of jurisdiction in the justices.—*Southfield vs. Bloomingrove*, 2 John. R. 105.

Selectmen cannot submit to arbitration whether one be a pauper, or not.—*Griswold vs. North Stonington*, 5 Conn. R. 367.

Overseers cannot affect a settlement by agreement.—*Barre vs. Morristown*, 4 Vt. R. 574.

*Argument for defendant.*—The proceedings on the part of the town of Williston, touching the removal of Geer, from thence to North Hero in Jan. 1834, were never completed and have no binding force.

Notice of the order, according to the requisition of the act of 1817, was never given to the town of North Hero: and until legal notice be given, that town is not bound to take measures to procure the reversal of the order.—Stat. 383, sect. 5.

No attested copy of this order was left with North Hero, and for this defect, the proceeding would have been quashed on appeal.—*Georgia vs. St. Albans*, 3 Vt. R. 42.

The justices who make the order, are the only proper authority

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to attest its accuracy. Hence the copy of the warrant of removal and its recitals and preface, attested by the constable, is not a compliance with the act.—*Strafford vs. Hartland*, 2 Vt. R. 568.

If the order of removal from Williston be conclusive on the defendant, it must be as an estoppel, which is never to be favored, or aided by inference. The general principle upon which an order of removal unappealed from, is held to be conclusive is, that it is *res judicata*, a perfect judgment by a court of competent jurisdiction; and this character of a perfect judgment it acquires, by being duly executed, and by being submitted to by the party against whom it is made.—*King vs. Corsham*, 11 East. 387.

Notice, the essential ingredient of the binding force of an order, and an opportunity to contest its validity are wanting to give this order the effect of a perfect judgment. The notice required by law was never given; it cannot therefore be said that North Hero submitted to the order.

A proceeding deriving all its force from statutory enactment must show the requirement of the statute complied with before it will be treated as perfect. That actual notice cannot be substituted for the notice required by law has repeatedly been decided by this court.—*Barre vs. Morristown*, 4 Vt. R. 574.

The conclusiveness of an order of removal as between towns not parties to it, rests upon its conclusive character between the towns that are parties to it. If the order is conclusive between the parties to it from considerations of public policy, that there may be an end to litigation, it is held to be conclusive as to all others. This order as between the towns of Williston and North Hero, was annulled and abandoned, and therefore proves nothing against either of their towns. It was never executed because the parties agreed that it should not be completed but abandoned. Pawlet then cannot set up this imperfect and abandoned proceeding as an estoppel.

If it be conceded that the order was duly executed and perfect still, it was competent for the parties to annul it and for the party in whose favor it was made to abandon it. A judgment of a court of competent jurisdiction is binding, but the party in whose favor it may be rendered may abandon it. Lord Ellenborough in the case of *King vs. Diddlebury*, held that the proposition that a parish in whose favor an order of removal was made might abandon it and utterly annul its effect, was too clear to require authority.—*King vs. Diddlebury*, 12 East. 359.—3 Stark. Ev. 1330-1.



The opinion of the court was delivered by

**COLLAMER, J.**—It is undisputed law that an order of removal, duly executed and submitted to, that is, unappealed from and unreversed, is while in force, as conclusive, and in the same manner as any other judgment of a court of competent jurisdiction. Nor does it become necessary here to decide at what time an appeal in such case must be taken; whether when the removal takes place, and a copy of the warrant is left before a copy of the order, or only when that shall have been left, as this case expressly finds that the time for appeal had not transpired when the case was adjusted. The question is, was it competent to the overseers to make a settlement, adjustment and abandonment of that suit, as it was then situate? Can the overseers, who have charge of an order of removal in behalf of a town in whose favor it is made, abandon it on finding it desperate, even by consent of the adversary town? It will hardly be insisted that this order will be in force as to others and not as between the parties thereto.

That the parties to a legal proceeding may make an end of strife, with safety, by common consent, is surely a principle to be favored; and should be extended to towns and to pauper causes as well as to all others, unless some very express arbitrary and inflexible rule of law forbid it. But the court are asked, in this case, to go even further, and give to this adjustment the directly contrary effect from its intended one, that is, not only to say the adjustment shall be avoided, but its effect shall be to deprive North Hero of any appeal, and fix the settlement of the pauper upon them. But on what ground is this asked? It would seem to be this. First, that the overseers had no power to make such adjustment. The proceeding is begun and carried through by the overseers of the poor. It is not only their duty to carry it on to an order, but to take out the warrant, procure it executed, see that a copy of the order is duly served and attend to it if appealed. Having thus the charge of the business they may never procure an order, or may neglect ever to execute it, or give notice thereof, and so permit it to expire. This is a matter in their discretion, and to say that they may abandon it directly by consent, gives them no more power than to do so indirectly or to have the useless expense of having an appeal entered in court and then *nolle prosequi* entered by the overseer, which he might clearly do.

It is however further insisted that such an abandonment ought not to be permitted because the order and its execution being matter of record and the adjustment not, it might mislead other towns

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whose rights might come afterwards in question, in relation to the same pauper. But this might also be said in relation to judgments of courts on many subjects. A defendant recovers in ejectment, and during the same term of the court, while it is open to review, he is entirely convinced this judgment will be reversed on review; he therefore discharges the judgment by release and abandons the land. By our statute a judgment in ejectment is conclusive of title as between the parties. Now it is true some one buying under the defendant might be misled by this judgment, but it will hardly be supposed that it would therefore be holden that the release was void and the judgment in force. The same may be said of many other legal proceedings. It is indeed possible that some degree of inconvenience might arise, but it would be small when compared with the evils arising from forbidding towns, by their overseers, from settling their pauper suits or holding the inconsistent doctrine that an order settled, abandoned and inoperative between the parties, should still be binding on one party when insisted on by others.

In entire concurrence with these principles, and fully sustaining them, is the case *Rex vs. Diddlebury*, 12 East. 359.

Judgment affirmed.

*G. W. Harmon for plaintiff.*

*Smalley and Adams for defendant.*

#### OLIVER HITCHCOCK vs. JACOB EGERTON JR.

RUTLAND,  
February,  
1836.

An action cannot be sustained against one as *trustee*, under the statute, merely because he is attorney for the absconding debtor, and has in his care a debt in the course of collection, against another person.

This was an action against the defendant as sheriff of Rutland county for the neglect of his deputy, *Pond*, in not collecting and paying over the amount of a certain execution in favor of the plaintiff against Quinton and Church. On the trial before the county court it appeared that said execution had been collected by said deputy who had offered to pay the amount to the plaintiff, who directed him to pay the same to William Spooner, to whom said debt in fact belonged, and that afterwards said Pond had paid a part of said execution to said Spooner, and during the term of the county court at which this action was tried, and before trial, he had tendered to the plaintiff's attorney the balance of said execution, with the costs. The plaintiff then offered John Kellogg as a wit-

ness who testified that he was attorney in the case, plaintiff against Quinton and Church, and notified Pond before he paid over any money to Spooner that he should insist on his lien for costs. The defendant objected to said Kellogg being used as a witness on the ground of interest, but the court admitted him. It then appeared by the testimony of Kellogg, that after he delivered to Pond the execution aforesaid for collection, an action was commenced by a creditor of W. Spooner against said Spooner, and said Kellogg was summoned as trustee of Spooner, which suit was still pending, and that Kellogg had given notice of this suit to Pond before he paid over any money to Spooner. The court to whom the issue was joined in this case, rendered judgment for the plaintiff for the whole amount of said execution, interest and cost, to which the defendant filed exception, and the cause passed to this court.

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*Argument for defendant.*—1. We contend that the payment to Spooner (the real owner of the execution) of the \$113,94, was a good accounting by the defendant's deputy for so much of the execution, and it left in his hands still \$17,49 to satisfy the lien of the attorney.

It appears from the case that the deputy sheriff offered to pay to the nominal plaintiff in the execution the amount of it, who refused to receive it saying, that Spooner owned the execution; he then pays to Spooner a part, who it appears from the case was the real owner of the execution, and the question is, Was he justified in making that payment?

As a reason why he was not, it is said, that a suit had been commenced against Kellogg, the attorney as the trustee of Spooner, and that the deputy had notice of this.

There can be no doubt but the payment would have been a good one, had no trustee process been pending; and it may well be asked, does that vary the case?

A creditor of an absconding or concealed debtor can compel payment to himself on debts due to the absconding debtor only in the manner pointed out in the statute, viz: by summoning the person himself, who has the goods, chattels, rights &c., and not by summoning the attorney or any body else.

In this case the deputy sheriff himself might, with propriety, claim that he should have been summoned as trustee, for nothing less than that will furnish him the protection given in the 10th section.

The deputy in this case was as much protected in paying the money to Spooner as he would have been if it had been a promissory note left with Kellogg for collection.

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And it results back to the original proposition, that the only method in which an absconding debtor's effects can be reached is the method pointed out by statute.

And if this judgment is affirmed, it will operate with peculiar hardship upon the deputy, who has once paid over the money, to compel him to resort to his remedy on Spooner, who, in the case supposed, has absconded, and is in reality a bankrupt.

But the trustee incurs no loss, for the case shows that he has not yet disclosed, and indeed he cannot disclose that he has any effects till this money is paid over to him.

And if the case is revised as to the \$113,94, no one sustains any injury except the creditors of Spooner, who, if they wished to reach this money, should have summoned the deputy.

2. If the tender made in this case does not defeat the right of recovery, we contend that at least in analogy to the 2d section of the statute of 1802, p. 145, the plaintiff should recover no costs which accrued subsequent to such tender.

3. The court erred in admitting Kellogg as a witness to prove the notice to the deputy of the pendency of the trustee suit. He had a direct interest to the extent of his lien.

*Argument for the plaintiff.*—The decision of the county court in admitting the testimony of Kellogg was correct—the witness had no interest in the present suit.

The case shows that the money was paid by defendant to Spooner after defendant had notice of the pendency of the trustee suit against Spooner. Such a payment is fraudulent.

The opinion of the court was delivered by

COLLAMER, J.—It seems that this suit was prosecuted in the name of the present plaintiff, not for his benefit, but for whom it may concern. The defendant concedes the collection of the execution, and shows a payment in part to Spooner by order of the plaintiff. In relation to the balance, the defendant is in default, and his tender, made after suit and in term time, is entirely useless.

It is however insisted, that judgment should be against the defendant for the whole execution on the ground that the trustee process served on the attorney, Kellogg, who had the demand belonging to Spooner in the name of Hitchcock against Quinton and Church, in collection, and of which notice was given to the defendant's deputy, Pond, reached this demand, and stopped the money in the sheriff's hands, and therefore the subsequent payment to Spooner was in the sheriff's own wrong, and ought not to avail him.

If that trustee process covered the present claim, then perhaps, the plaintiff might recover; but if it does not, then, clearly, the payment to Spooner, was right as it was one he could have enforced at law. Spooner was the true owner of this debt,—who was trustee of it to him? The debtor in execution, until he paid, then the officer who had the money. The person who merely holds the security, the attorney who has the demand in collection, but has not received the money, is not trustee. This question is fully considered and decided in the case *Sargent vs. Lealand*, 2 Vt. R. 277, and is conclusive of this question. Neither the officer or the execution debtor were made parties to that trustee process, and of course this debt was not reached by that process; therefore, the payment to Spooner was legally made.

As we consider this action cannot be sustained against the defendant for that part of the execution which he paid to Spooner, let the evidence of the facts insisted on, come from what quarter they may, it becomes unnecessary to decide on the question of the witness's interest or admissibility.

The judgment below, having been rendered against the defendant for the whole execution is erroneous, therefore,

Judgment reversed.

Judgment rendered for the balance of the execution not paid to Spooner.

*Ormsbee for plaintiff.*

*Royce and Strong for defendant.*

### DANIEL H. DYER vs. SILAS JONES.

RUTLAND,  
February,  
1836.

In the case of labor performed on land, under a special contract, but not strictly according to the *terms* of the contract, if it be of some benefit to defendant, the plaintiff may recover on a *quantum meruit*, as much only as the labor is worth to defendant.

The questions in this case sufficiently appear from the opinion of the court, delivered by

REDFIELD, J.—This was an action of book account, in which defendant claimed an offset, of \$72 for chopping trees on plaintiff's land, leased to defendant. One of the conditions contained in the lease is "that defendant may chop as much as he pleases at \$2.75 per acre," and the manner of performing the work is particularly specified. The defendant charged according to the stipulated price. The plaintiff gave evidence, tending to show that the

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work was done in such a manner as to be of no value to him. The auditors report, that they allowed defendant what he *deserved to have for the work*, being less than the price agreed, by almost one half. They, of course, find the fact that the work was not performed according to the *terms* of the contract, and the only question is, did the auditors err in allowing defendant to recover for the work as on a *quantum meruit*?

It is well settled that in all contracts for work and labor, which are not performed according to the terms of the contract, and which are susceptible of being rescinded, and where the party for whom the labor is performed, on discovering the inferiority, gives immediate notice, no recovery whatever can be had.—*Ellis vs. Hamblin*, 3 Taunton 52.

But where from the nature of the contract it is impossible to put the parties *in statu quo*, as where A builds a house or wall on B's land, or as in the present case, where labor has been performed on plaintiff's land by defendant, from which plaintiff will and must derive *some* benefit and which cannot be transferred to defendant, the party really entitled to it, it has been held that the party performing the labor might recover so much *only* as the labor is worth to the party who *must* have the *benefit* of it. This rule is adopted *ex necessitate*, to prevent one party gaining an unconscionable advantage over the other. The failure to perform the contract strictly according to its terms, may have been rather the misfortune than the fault of the party, but it forever precludes a recovery *upon the contract*, for strict performance is a condition precedent to any right of action. But the laborer is entitled to his own labor, or its product, where it is in such a shape that he can carry it away. In this case he cannot. Hence the rule has been adopted that the laborer may recover as on a *quantum meruit*, or in strictness what the labor is worth to the defendant and no more. Otherwise the party *benefited* would owe no equivalent, and the party laboring would be without all remedy.—*Farnsworth vs. Gonard*, 1 Camp. 38.—15 Petersdorff 436, and notes.—1 Swift's Dig. 684.

As the auditors pursued this rule, the judgment of the county court, accepting their report, is affirmed.

JACOB EGERTON JR. *vs.* PHILO D. HART *et al.*

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Where a dilatory plea, before a justice of the peace, is, even after judgment thereon, by the consent of parties *waived*, judgment may be rendered on the merits, and the record may be made up as if no such plea had been ever interposed.

This was an action of debt on a jail bond, given to the plaintiff as sheriff of Rutland county on admitting Philo D. Hart to the liberties of the prison, when committed on an execution in favor of Lowell W. Guernsey. On the trial, the execution of the bond and breach of its condition being conceded, the plaintiff showed a duly certified copy of a judgment rendered by justice Marsh, of Shrewsbury, on the 14th day of January 1832, in favor of said Guernsey against said Hart, on which the execution issued whereon said Hart was committed. The defendants relied on said judgment being void, and introduced a copy of a record of a proceeding and judgment between the same parties, of the same date before said Justice Marsh, at Shrewsbury on which they relied to show said judgment void. The record produced by the plaintiff showed the issuing of an original writ in an action on a note against Philo D. Hart and George Hart, a service on Philo D. Hart only, and a judgment against him only; on which execution issued. The record produced by the defendants showed the issuing of said writ, the service on Philo D. Hart only, and the record then proceeded thus, "Parties appeared and defendant "plead in abatement to plaintiff's declaration; whereupon plaintiff "suffered non suit and paid defendant his cost, which was taxed at "\$4,25. Parties then agreed to go to trial on condition the defendant should take no exceptions to the body of the writ. "Whereupon the defendant plead in abatement to the writ, the "service having been made on Philo Hart and issued against "Philo and George Hart, which objection was deferred for further "consideration by the said justice, whereupon the said parties "agreed to go on to the trial of the merits, and in case the afore-said plea of abatement prevailed, the defendant to recover his "costs, and if the plaintiff succeeded in supporting his declaration "on the merits, then the plaintiff to recover judgment upon the "matters aforesaid. On the 14th day of January 1832, it was "adjudged by the said justice that the defendant's plea of abatement was good, and that the defendant recover his costs, taxed at "\$1,30. And further, that the plaintiff had supported his declaration and found for him to recover \$11,52 damages and "costs, taxed at \$2,28." The county court decided that said judgment was not void, and rendered judgment for the plaintiff to which the defendant excepted.

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*Argument for defendants.*—The case shows that on the process originally sued out, a judgment of non-suit was rendered. The process was then ended. It was "*functus officio*."

The agreements by the parties to revive the process was without consideration; it was a mere *nudum pactum*.

*Argument for the plaintiff.*—The only question to be decided is, in regard to the validity of the justice's record.

In the first instance, the justice in attempting to make his record of the judgment, endeavored to give a detailed history of the several pleas in abatement, which were severally decided against the plaintiff, and the subsequent waiver of those pleas by the defendants on payment of the costs, and the final agreement of the parties to take a trial upon the merits; but in this attempt to give a narrative, he failed to make a correct history. Upon the application of the plaintiff for a copy of the record, he so far corrected his record as to strike out the narrating part of the several pleas in abatement, and the subsequent agreements of the parties, and made up his record as though no objections had been taken and no agreements made.

In support of the action the plaintiff produced a certified copy of the record, which was perfect, and to which no objection could be made.

In defense the defendants produced another copy purporting to be a copy of the same record. which was incorrect and imperfect, and it is for the court to decide which of these copies is to be received as the true copy of the record, or whether a magistrate has a right to correct his record and make it according to truth, whenever he finds he has committed an error in making up his record.

The opinion of the court was delivered by

COLLAMER, J.—Was this judgment void? No irregularity or informality can render a judgment *void*, and so make all concerned trespassers, when the judgment has been rendered by a court of competent jurisdiction and the parties have had due notice. It is to be recollected this is not a proceeding to reverse the judgment.

But it is insisted that really and in fact the defendant had no notice, and there was no precept. To show this the defendants, suggesting diminution, produced another copy of record, which they insist is of the same judgment, and shows it void. Their indentity is not certain, and this oblique manner of *impeaching* and *reversing* a judgment cannot be sustained unless in may be evidence to show it *void*, in fact. On examination of this paper we discov-



er nothing of that character. Hart had notice was present and the whole course was taken by his consent. It is obvious the justice but attempts to detail the course of proceedings too frequently indulged before justices, especially by lawyers, of taking one exception or dilatory proceeding after another, and on being paid cost, *waiving the objection*. And though such is not precisely the language used, such is its effect. Such waiver may as well take place by consent after a nonsuit as after a judgment sustaining a plea in abatement, which is constantly done. Indeed after the waiver of the objection, the justice may treat it, together with all that resulted from it, as if it had never existed. The proceedings were *in paper* and when the justice came to make up his record he was well justified in making it up as he delivered it to the plaintiff.

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*Thrall for plaintiff.*

*Button, Merrill and Ormsbee for defendants.*

#### SELECTMEN OF CASTLETON vs. LEWIS MINER et al.

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In the case of a warranty against all claims of a certain character, in case of suit brought against the covenantee, he must notify the covenantor or the judgment will be considered strictly *res inter alios acta*.

The warrantor may in such case contest the judgment on its original merits, and by showing it without just foundation, compel the covenantee to bear the loss of a payment made under it, as a voluntary payment.

But the covenantee may submit to pay the claim even without suit, and in that case will recover of the warrantor by showing it to have been a claim which he could not have resisted.

No obligation rests upon towns, aside from the provisions of the statute to sustain their poor, nor can they be compelled to pay for the necessary support of an acknowledged pauper, unless by *express* contract with them in their corporate capacity, or with the overseers in the mode pointed out by statute.

This was an action of debt on bond conditioned to support the poor of the town of Castleton for one year from 12th day of March 1832, and at the end of said year "*return said poor as well clothed as they were at the making of the contract,*" and to indemnify and save the town harmless from all "expense, loss or cost on account of said poor."

The issue joined to the jury in the court below, was, whether the defendants had saved the town of Castleton harmless, and whether the town had been legally damnified on the account of defendant's neglect. The bond was executed in the name of the selectmen of the town.

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The plaintiffs gave in evidence the record of a suit and judgment in favor of Isaac Ressique against said town of Castleton, with evidence showing that the said judgment was paid by the said town, before the commencement of this suit. It appeared in evidence that the claim on which said Ressique so recovered was for necessary support furnished to Mrs. Dewey at his house in Hubbardton in A. D. 1832, subsequently to the execution of the bond in suit. That the person so supported had been an annual charge upon said town of Castleton for several years and kept by said Ressenque sometimes by contract with the selectmen and at others by agreement with those who had contracted to support the paupers of said town—that she was very old, entirely helpless and incapable of being removed from the house of said Ressique at any time in 1832, without danger to her life or health. That for the year next previous to the execution of said bond, said Ressique kept said pauper in virtue of an agreement made with one Lush who was under contract with said town to support the poor of said town for that year. That the facts aforesaid were known to defendants at the giving of said bond. That after the execution of the bond in suit the defendant Miner sent to said Ressique, signifying his (said Miner's) determination not to do any thing about supporting said pauper. Ressique continued to support her until her death in June 1832. No evidence was given tending to show that said Ressique kept said pauper in A. D. 1832 by direction or request of the town or any of its officers unless such request ought to be implied from the facts aforesaid. It did not appear that either of the defendants had notice of said Ressique's suit against the town.

The court having expressed their opinion that upon this showing the plaintiffs were not entitled to recover they submitted to a non-suit with liberty to move the supreme court to set the same aside,

*Merrill and Ormsbee for plaintiff.*—The undertaking of Miner to support the poor was unconditional and absolute. By the terms and spirit of the bond he was obliged to indemnify and save the town harmless in the premises.

At the time of the execution of the bond, Mrs. Dewey was known by the defendants to be a pauper chargeable on the town. She had long been supported by Ressique at the expense of the town, and at this time, and until her death, was so infirm that she could not be removed without endangering her life.

The town then was liable to Ressique who collected his pay of the town in a legal way.

But the case shows that defendant Miner sent word to Mr. Ressique that he should do nothing towards the pauper's support.

The plaintiff contends that after contracting to support the poor he cannot discharge himself or the town by refusing to fulfil his engagement.

*Argument for defendants.*—The judgment in favor of Ressique against Castleton was rendered on default, without any knowledge of the suit being communicated to either of the defendants until after the town was actually charged with execution.

The defendants insist, that to the action in favor of Ressique, the plaintiff had a good and legal defence, and that the plaintiff should have either made that defence, or afforded the defendants an opportunity to make it, by giving them timely notice of the pendency of the suit.

The plaintiff having failed to do this, it only remains to enquire whether Ressique had any claim, or cause of action against the town?

At the trial below it appeared, that the pauper, for whose maintenance Ressique recovered, was his wife's mother; that neither the town, the defendants, nor any person on their account, had ever employed him to render her any assistance, and that all he had done for her, were mere voluntary acts of charity, or affection, induced by the relation subsisting between them.

That such acts give no right of recovery, has been settled, by repeated decisions in our own state. In the case of *Middlebury vs. Hubbardton*, 1 D. Chip. 205, it was decided, that an action will not lie, at common law, against a town for the support of their paupers, and the learned judge proceeds to say, "that it is equally clear that such action cannot be maintained on the general provision in the statute, declaring it to be the duty of each town to support their own paupers." The same principle is recognized in the case of *Jamacia vs. Guilford*, 2 D. Chip. 103.

But the case of *Aldrich vs. Londonderry*, 5 Vt. R. 441, is exactly in point. It is there decided that no action can be maintained against a town, at the suit of an individual, on the general provisions of the statute declaring it to be the duty of a town to support their own poor, nor will any action lie against them for support afforded to a pauper, unless it was afforded at their request, or unless there be a subsequent promise to pay. In giving the opin-

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ion of the court, the judge there says, "No principle seems to be better settled than this, that there is no implied contract on the part of a town, to pay for services, or relief afforded to a pauper, which was not afforded at their special request.

The opinion of the court was delivered by

REDFIELD, J.—As the judgment in favor of Ressique against the town was without notice to the defendants or either of them, they are not in any way affected by it. It is strictly *res inter alios acta*. How far the case might have been affected by notice of the suit to defendants, and a subsequent judgment against the town of Castleton, it is not necessary to determine.

The question then must be determined upon the character of Ressique's claim against the town. If that was a legal claim, which might be enforced against the town, and he had brought suit or demanded pay, they were not obliged to enter into litigation with him, but might pay the amount due either before or after judgment, and without notice to defendants. But in paying a claim, as without giving the defendants, as warrantors, an opportunity to contest it, they would act at their peril; and in a suit to recover the amount, must assume the burden of showing, that the claim was just and legal, and that it could not have been successfully resisted.—*Hamilton vs. Cutts and wife*, 4 Mass. 349.—9 Conn. 154, *Stone vs. Hooker*.

The question to be determined here is, whether Ressique had any *legal avoidable* claim upon the town of Castleton to reimburse expenses, which he had incurred in the support of Mrs. Dewey.

It is admitted there was no express contract between Ressique and the town. Ressique had supported her the year before for the town by legal contract, and she was incapable of being removed, and the defendants being *bound* to support her *expressly* refused so to do. This may be a case of extreme severity, but the court can see no just grounds upon which it can be said the town were chargeable.

It has been too long settled, both in Westminster Hall and in the United States, that no obligation now, aside from that imposed by statute, rests upon towns to sustain their own poor, to be brought in question. The obligation is altogether a matter of positive law, and the right of any one to compel towns to pay for the support of their poor is one *stricti juris*, and cannot be enforced except in accordance with some statutory provision.—See *Middlebury vs. Hubbardton*, 1 D. Chip. 205.—*Jamacia vs. Guilford*, 2 D. Chip

R. 103, and the numerous cases referred to in the case of *Aldrich vs. Londonderry*.—No obligation rests upon towns, as such, to support their poor, any more than to support stated preaching or regular schools. Nor are towns any more bound to this duty, than school districts or county or any other public corporations, aside from the requisitions of the statute. Hence it has always been held that an obligation or a promise on the part of the town to pay for the support of their poor, can never be implied. The contract must always be express, either with the town or the overseer, and in the latter case it has been held, the overseer must comply strictly with the provisions of the statute, or he does not bind the town. The case of *Aldrich vs. Londonderry*, 5 Vt. R. 441, is fully in point. It is almost the same case. And here, although Mrs. Dewey could not have been removed, and was an acknowledged pauper of the town of Castleton, still Ressique could not compel them to pay for her necessary support, except by application to the overseers of the poor of Hubbardton, where the pauper was. This he should have done, and thus Castleton would have been *compelled* to defray the expense of sustaining the pauper, and could, in that case, have recovered the amount of defendants. But as they have *voluntarily* paid an expense which could not have been recovered of them, they must bear the loss, and the defendants thus escape perhaps an equitable claim. Of this however we know nothing.

The judgment of this court is, that the plaintiffs take nothing by their motion, and that the judgment of the court below is affirmed.

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EZRA WILKINS vs. JOEL STEVENS.

On a contract for the delivery of manufactured articles of a given description at a given time and place, if the *quantity* specified in the contract and of the same description, although not of the same quality, be delivered at the time and place, and the defendant proceed to use part of the goods and to pay part of the price, without objection until after a question arises as to payment, he will be considered as having accepted the articles and waived all claim for damages, or a reduction of the price stipulated, on account of any open and apparent defects therein.

In such case, if the articles be of a kind usually charged on book, although the contract were in *writing*, and payment to be made in specific articles, yet if the term of credit has expired, a recovery may be had in the action of book account, provided the contract is expressed in dollars.

In such case, the stipulation being considered as introduced for the use of defendant, if not performed, it is the same here, although not at common law, as if the contract had been originally payable in money, and general indebitatus assumpsit or book account will lie in this state. But if the contract be so far special, that the object of the action is to recover for *breach* of defendant's *promise*, rather than the value of plaintiff's part of the performance of the contract, this action will not lie.

This was an action of book account, in which plaintiff claimed to recover for certain cart and wagon hubs, sold and delivered to defendant. The auditor reported for the plaintiff, and stated the following facts as the basis of his report. The contract between the parties was as follows.

Rutland, Feb. 26, 1833.

"Then agreed Joel Stevens with Ezra Wilkins for 100 set of hubs, to be delivered at Rutland East village, on or before the first of June next, for which the said Joel agrees to pay the said Ezra according to the prices hereinafter named.

For one horse hubs, 50 cts. per set.

Cart hubs, 50 cts. do.

2 horse hubs, 70 cts. do.

Sulkey hubs, 25 cts. do.

10 set of cart hubs, \$5 00

20 do. 2 horse do. 14 00

10 Sulkey do. 2 50

60 1 horse do. 30 00

\$51 50

The said Joel agrees to pay the said Ezra for the above described bill of hubs, when delivered to Rutland, on demand, seventeen dollars and fifty cents in money, \$17 50

One pair of thin boots, two pair thick boots, 2 pair thick shoes, 15 00

Fourteen dollars in fulled cloth at our common charging prices,  
Five dollars in cotton sheeting, do. do. do.

14 00

5 00

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\$51 50

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The above mentioned bill of hubs the said Ezra agrees and binds himself to make of good sound timber and turned in a workman-like manner, or pay all damage, &c. Signed by both parties, and by plaintiff endorsed, "paid except the boots and shoes."

It was further reported that the plaintiff made and delivered the number and description of articles specified above, at the time and place, the defendant not being present. The defendant continued to use them without objection, and paid all except the boots and shoes, saying at one time that the "one horse wagon hubs were too small," but at the same time paying \$36 50, and saying he should pay the balance in a few days. Accordingly defendant sent boots and shoes of an inferior quality, but of the general description specified in the contract to plaintiff, which he refused to accept, and afterwards defendant put them to his own use, saying the hubs were not according to the contract, there then remaining at the place of delivery, thirty one set of hubs for one horse wagons. The auditor reports that these hubs were too small and irregular. Exceptions being filed to the report, the county court accepted it and gave judgment for plaintiff, to which defendant excepted, and the case comes here for revision.

*G. W. Harman for defendant.*—I. The action of book account will not lie in this case, because the articles embraced in the plaintiff's accounts, were made, and so far as there was a delivery, delivered, in pursuance of the written contract, making a part of the auditor's report.

1. Book account lies in general for such articles of personal estate sold and delivered for the use of such personal things let and hired, and for such services done by one for another, as are ordinarily charged on book.—2 Sw. Sys. 167—1 Aik. Rep. 101—3 Vt. Rep. 246, ib. 469—5 Vt. Rep. 363.

2. It lies for "labor done by the month, at a fixed price, and payable at a future day, if payment is not made as agreed."—3 Vt. Rep. 246—5 Vt. Rep. 363, *Leach vs. Shepherd*.

3. Book account does not lie to recover damages arising from the breach of a contract, nor when there has been a tort commit-

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ted.—2 Sw. Sys. 168—1 Aik. Rep. 101—2 Aik. Rep. 383—9  
3 Vt. Rep. 246.

4. It does not lie where there has been a special contract in writing, under which the articles were delivered.—Bray. Rep. 39, *Whelpley vs. Higley*—1 Con. R. 75—2 Root Rep. 130, *Johnson vs. Gunn*.

5. But a special agreement, as to the *mode of payment*, never precluded this action.—2 Aik. Rep. 389, *Fay vs. Green*—2 Vt. Rep. 65, *Boardman vs. Keeler*—ib. 366, *Newton vs. Higgins*—ib. 455, *Skinner vs. Conant*.

6. Book account will not lie in the present case, because the party should not be permitted to swear to the performance of his contract, for if he may, then indeed, "few cases will remain, to which the salutary rule of law, that a party cannot be a witness for himself, will apply.—1 Aik. R. 145, *Read vs. Barlow*—1 Vt. R. 97, same case.

II. There was no actual delivery in this case.

1. The right to charge must exist at the time of delivery, and must arise in consequence of such delivery, and cannot depend on the happening of subsequent events.—1 Day's cases, 106—1 Aik. Rep. 73, *Hapon vs. Davis*—id. 148, *Read vs. Barlow*—1 Vt. R. 97, same case—3 Vt. R. 469, *May vs. Brownell*.

2. There must be an actual and not a constructive delivery, to authorize this action.—Sw. Ev. 83—1 Aik. 145, and 1 Vt. R. 97, *Read vs. Barlow*.

III. The contract was not fulfilled. The report finds, that some of the hubs were too small and otherwise defective: and the plaintiff having failed to perform on his part, cannot recover of the defendant.

*S. Foot for plaintiff*.—1. The action of book account is the proper action in this case. It has long been settled by an uniform course of decisions in Connecticut and in this state, that this action is the proper remedy for any articles of personal property, sold and delivered, personal services, &c. which, in the ordinary intercourse of men, are charged on book. There can be no question, but the articles charged in this case, were the proper subjects of book account. They were also delivered at the time and place agreed upon by the parties. Their having been delivered in pursuance of a special agreement, cannot deprive the plaintiff of his remedy in this form of action. The application of such a rule would have the effect to entirely abolish this action; for there can be no sale, and consequently no right to charge an article on book, unless



there be some agreement, some contract respecting it, between the parties; and it matters not whether this contract be express or implied, verbal or written. Whatever the contract may be, as to the price, mode or time of payment, it is competent for the parties to testify in relation to it, and if the contract be in writing, that may be given in evidence.—See 1 Swift, 592—2 Aik. 81, *Stevens et al. vs. Richards et al.*—Do. 386, *Fay et al. vs. Green*—2 Vt. R. 366, *Newton vs. Higgins*—3 Vt. R. 246, *Fry vs. Slyfield*—5 Vt. R. 363, *Leach et al. vs. Shepard*—Do. 451, *Whiting vs. Corwin*—6 Vt. R. 340, *Blish et al. vs. Granger*.

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2. The auditor has found that the hubs were delivered at the time and place agreed upon, that some three weeks afterwards the defendant sent for and took home a load of the hubs, and that after this the plaintiff called on him for his pay, and received it in full, except the boots and shoes, which the defendant then promised to send soon. He had thus accepted the hubs, in fulfilment of the contract on the part of plaintiff, and it was too late then for the defendant to refuse payment, on the ground of non-acceptance, for the insufficiency of the hubs.—*Billings vs. Needham*, in this court, February term, 1834, (not reported).—6 Vt. Rep. 340, *Blish et al. vs. Granger*, and the cases there cited.

The opinion of the court was delivered by

REDFIELD, J.—If there be any one subject of more just regret than all others, in relation to the action of book account, it is the protracted litigation about pitiful, small sums, which is constantly growing out of the action. We would be glad so far to define the limits of the action, as to obviate the necessity of so much discussion of that topic. But among such endless variety of cases, as are constantly presenting themselves before us, confusion rather than activity is to be feared.

The present case, in principle, is almost identical with that of *Blish and Richmond vs. Granger*, 6 Vt. R. 340. But it is not the same case, and the defendant insists, cannot be brought within the known limits of the action of book account. Formerly great diversity of opinion among the profession, and not a little upon the bench, prevailed in relation to the policy of restricting or extending the boundaries of this action. And the mode of trial, which obtains by statute in that action, is so different from proceedings in trials at common law, that there is very just grounds for such contrariety of opinion. Some, indeed, of eminent attainments in judicial science and learning, prefer extending the same mode of trial

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to all action; while others, of no less pretensions, would wish to abolish the action entirely. As in other cases, in *medio tutissime ibis*.

It is first objected, here has been no *delivery* of the thirty-one set of hubs, still remaining at the place specified in the contract; but that, at most, it cannot amount to more than a tender and refusal. If the property had only been tendered at the time and place, and not accepted, this action would not lie—*Reed vs. Barlow*, 1 Aik. 145.

But the defendant, having here proceeded to use most of the hubs without objection, and having paid and offered to pay the full price, must be considered as having accepted the hubs, and waived all objection on account of any *apparent* defect therein. What remedy he might have for *secret* or *latent* defects, known or not known to the plaintiff, but unknown to defendant, it is not necessary to determine. But an acquiescence, of the character shown in this case, should preclude him from now refusing the hubs, or claiming damages or a reduction in price, on account of the size or shape of the hubs, which must have been known to defendant from the first. This is in accordance with well established principles of common law, both in relation to *labor* and *goods*.—2 Starkie Ev. 640, 641, 642, 643, 644—*Everett vs. Gray*, 1 Mass. R. 101—*Fisher vs. Sumada*, 1 Camp. 190—*Grimaldi vs. White*, 4 Esp. cases Nisi Prius, 95.

It is further objected, that the contract in this case precludes the right to charge the articles on book. But the contract being in writing clearly makes no difference in the remedy, whether at common law or in this form of action. The law attaches no higher importance to a contract in writing, in relation to the extent or the character of the obligation which it imposes, than it does to a contract resting in *mere words* not reduced to writing. A written contract may be superseded, released or rescinded, by a subsequent verbal contract, upon good consideration. The maxim of *eo ligamine quo ligatus*, which the law applies to contracts under seal, does not apply to merely written contracts. The question whether the party may bring this action, depends upon other considerations than the mode of authenticating the contract.

1. Did the plaintiff look to the written contract for his remedy? Clearly not. For the written contract would show no cause of action. That depended upon the delivery, which must rest in parol exclusively, and be proved by testimony, without the writ-

ing. And this point is the very hinge upon which the right to recover rests.

2. The written contract contained nothing more than the law will imply except as to the *amount* and *time* and *mode* of payment; and it has always been held that any special agreement as to these *mere incidents* of the contract, will not preclude plaintiff's right to charge the articles sold or labor performed on book, and recover in this form of action.—*Newton vs. Higgins*, 2 Vt. R. 366—*Fry vs. Slyfield*, 3 Vt. Rep. 246—*Whiting vs. Corwin*, 5 Vt. 451—*Blish et al. vs. Granger*, ubi supra.—

3. It is urged that this is virtually a claim for damages for the breach of a special contract. If so, the action cannot be sustained, But we consider that after the term of credit has expired and the obligation to pay in money become absolute, it is the same as if the contract had never contained any stipulation for payment in specific or collateral articles. And in all those states where tobacco, as in Maryland, or grain or manufactured articles, as in many of the New England states, form a *quasi currency*, this doctrine has always obtained. Hence in this state it was very early decided, that goods sold and delivered, or labor done and performed, to be paid in specific articles, might, after the term of credit had elapsed, be recovered *under the general count*, which could not be done at common law. There, unless the payment was to be made *in money*, the declaration must be special, and damages were given for the *non delivery* of the specific or collateral articles.—1 Saunderson's R. 269 and notes—1 Chitty Pleadings, 337—15 Petersdorf, 435 and notes—*Talver vs. West*, Holt N. P. C. 178—2 Petersd. 421.

But with us, any such stipulation, when the contract is as in the present case, expressed in dollars, has been considered as introduced for the ease of the debtor, and unless performed, to be the same as if it had not been so expressed and the contract stood for so many dollars in the legal currency.

Hence in every case, when in the action on book, the parties claim to recover for goods sold and delivered, or labor, &c. if they are the ordinary subjects of book charge and might have been recovered under the general *indebitatus* counts in assumpsit, they will be permitted to recover.

In whatever form of action the plaintiff, in this case, proceeds, he must either recover the \$15 or the value of the hubs, deducting payments made, and could never go for the value of the boots and shoes. It was at the election of defendant whether to pay in

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that manner or not. If he omitted so to pay, he could not be permitted to reduce the sum, named in the contract, in dollars, by showing the specific articles were of less value, nor could plaintiff be permitted to show they were of greater value.

But whenever the contract is so expressed, that the party must go, not for a fixed price named in currency, not for the value of his alternative of the obligation, but *for the value of defendant's promise*, then neither this action nor general indebitatus assumpsit will lie. In this case there is no error.

Judgment is affirmed.

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RICHARD HOWE vs. HARRIS HOSFORD *et al.*

A justice of the peace cannot continue a cause returnable before another justice, under the statute of 1832, who is interested as bail for the prosecution.

If a justice, who is interested, does continue a cause, and the parties appear at the time and place to which the cause is continued, take a trial on the merits and make no objection on account of the improper continuance, they cannot afterwards move to dismiss the cause for that reason; but the irregularity in the continuance is considered as waived.

This was a suit which came up from a justice of the peace by appeal. The record showed that the cause was adjourned in the absence of the justice before whom the writ was returnable, by Z. Howe, Esq. who was bail for the prosecution. The defendant moved to dismiss the suit, contending that Howe had no jurisdiction in the case, and to the decision of the court, dismissing the suit, the defendant excepted.

*J. Clark for defendant*—In this case the defendants contend, that Z. Howe, Esq. having been recognized for costs, in the suit continued by him, had not jurisdiction to continue it, by virtue of the statute.—See acts of 1832, p. 3.

By that act, any justice of the peace of the same county, who could legally try a cause between the parties may, at the time, continue the cause, if the justice be unable to attend.

The legislature could not have intended as insisted by plaintiff. For in that case, if Z. Howe had been the owner of the demand against defendants, he might have continued his own cause for the reasons mentioned in the statute, provided he was not within the fourth degree of affinity or consanguinity to the defendants, a construction

evidently not intended by the legislature. The continuance of the cause was a judicial act and should have been performed by a disinterested justice of the peace.

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The principle, as contended for by the defendants, has been decided by the county court in Addison county.

*Z. Howe for plaintiff.*—In this cause, the principal question presented for consideration is, whether a justice of the peace, having become recognized for costs of prosecuting a suit before another justice, can, in case of the sickness of the justice signing the writ, continue such cause, agreeably to the statute of 1832?—See 2d vol. Compiled Laws, p. 30.

The statute provides, "that whenever any civil process shall have been served, returnable before any justice of the peace within this state, and at the time appointed for the trial, said justice, by reason of sickness or other cause, shall be unable to attend at the place appointed for holding the court, any justice of the peace, for the same county, who could legally try a cause between the parties, may, at the time and place of trial, continue such cause to some time, when, in his opinion, the justice of the peace who signed the writ will be able to attend.

This statute, being remedial, is entitled to a liberal construction. —Black. vol. 1 p. 87 and 88, Christian's Note, 19.

Should the statute receive such construction, the question is decided at once. But give the statute a *strictly literal* construction, and it confers the power on such justice to perform this act. The language of the statute is, "any justice of the peace, who could legally try a cause between the parties, may," &c., and not, any justice who could legally try *the cause* to be continued. This latter expression would have, unquestionably, been used, had this been the intention of the legislature. A justice may have disqualified himself for *trying* the cause in question, by having formed and expressed an opinion, by having been counsel for one of the parties, by having become bail for the defendant, by endorsing his name on the back of the writ, or, as in the present case, by becoming bail for the costs of prosecution on the part of the plaintiff, still such justice is authorized to continue such cause agreeably to the provisions of the statute, at the same time giving the statute a *strictly literal* construction. But there is no good reason why this statute should not receive a *liberal* construction. It authorises the performance of a mere ministerial act, and no danger can be apprehended by giving the statute that construction, which will make

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it operate most beneficially to prevent the evil intended to be prevented by its passage.

Again, this motion is out of season. It being in the nature of a plea in abatement, it should have been made before the justice. By omitting to do so, this question was waived by the defendants. —Vt. Rep. vol. 6, p. 509 and 511, Kellogg *ex parte*.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This case presents for consideration the construction to be placed on the statute of 1832, which provides, “that whenever any civil process shall have been served, returnable before any justice of the peace within this state, and at the time appointed for the trial, said justice, by reason of sickness or other cause, shall be unable to attend at the place appointed for holding the court, any justice of the peace for the same county, who could legally try *a cause* between the parties, may, at the time of trial, continue such cause to some time when, in his opinion, the justice of the peace, who signed the writ, will be able to attend.”

It appears that Mr. Howe, the justice who continued the cause, was interested in the same, as bail for the prosecution. The act which the justice is required to perform, in such cases, is not to be considered as a mere ministerial act. The justice must determine as to the time to which the trial is to be postponed, and must enter on the files the reasons for which the continuance is granted. We think the obvious meaning of the statute is, that the justice who is to perform this act, must be one who could try *the cause in controversy*, and that a different construction would be manifestly absurd. The legislature evidently intended that the magistrate should be one who could have taken cognizance of the suit or cause, and could not have intended to exclude those magistrates only, who could try no cause between the parties; that is, those magistrate alone, who were within the fourth degree of consanguinity and affinity to the parties. Mr. Howe being the bail in the suit, was not such a magistrate as was authorised by the statute to continue the cause.

But this was only an irregularity in the proceedings, which the parties might waive, and unless seasonably noticed, should be considered as abandoned. We find, on examination of the records, that at the time to which the continuance was granted, the defendant did not insist on this irregularity. This was the time when his motion to dismiss should have been made. By appearing in the

suit, at the time to which the same was continued ; taking a trial on the merits ; appealing to the county court, and not making any motion to dismiss the suit, until after it came into the county court, he must be considered as having waived any advantage or benefit which he might have insisted on, on account of the irregular continuance.

The judgment of the county court must therefore be reversed, and the cause remanded for trial.

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## STATE vs. SHREWSBURY.

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The select men of a town have no power to discontinue a road, laid by the road commissioners, or a committee appointed by the legislature or supreme or county court.

This was an indictment for not opening and making a certain road, laid by the road commissioners, described in said indictment. On the trial the defendant offered in evidence a copy of the record, showing a discontinuance of said road, by the select men of Shrewsbury ; to which evidence the attorney for the government objected, and the same was rejected by the court. To which decision of the court, the defendant excepted.

Exceptions allowed and ordered to supreme court.

*Argument for plaintiff.*—It is contended that the select men had no authority to discontinue this road.

By act of 1813, statute, p. 439, the select men of the several towns in this state were authorised and empowered to discontinue any road in their respective towns, &c. except such as have been laid by any committee appointed by one of the county courts in this state, or by act of the general assembly.

By the act of 1827, pamphlet, p. 13, road commissioners were created with full powers, &c. and by the 10th section of that act, all former acts, coming within the purview of that act, were repealed.

By this act the powers of the select men to discontinue roads laid by the road commissioners, were taken away.

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In Nov. 1831, this act was repealed by which the act of 1813 was again revived, but by a saving clause of this repealing act, the doings of the road commissioners were not to be affected. The select men, therefore, derived no power to discontinue roads laid by the road commissioners.

*The counsel for defendant* grounded the defence on the statute of 1813.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The town of Shrewsbury are indicted for not opening a road, laid out by the road commissioners. On trial they offered to prove in defence, that the road had been discontinued by the select men of the town. The evidence was rejected by the county court, and we think the evidence was inadmissible. The select men have no authority to discontinue roads laid out by the road commissioners, a committee of the legislation, or a committee appointed by the supreme or county court.

There must, therefore, be judgment on the verdict.

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#### LENT IVES vs. WALLINGFORD.

The select men and overseers of the poor cannot make a contract obligatory on the town, for the support of a person having a settlement therein, for a greater sum than five dollars, without an order from a justice of the peace, in pursuance of the 20th section of the statute in relation to settlements and providing for the poor.

This was an action of assumpsit brought by the plaintiff to recover for board, washing, lodging, doctoring and other necessities furnished and provided for one Patty Preston belonging to and resident in said town of Wallingford. It appeared on the trial that said Patty, on the 24th day May, A. D. 1834, she being then about twenty four years of age, became suddenly sick and remained so until her death, in the month of December following, and during all that time required constant nursing, doctoring and other necessities; and that the plaintiff furnished the same to the said Patty from the said 24th day of May, A. D. 1834, to the day following. It further appeared on said trial, that two of the select men of the town of Wallingford requested the plaintiff to take charge of the said Patty and furnish her with every thing necessary, and that the town of Wallingford would compen-



sate and pay him for the same. It appeared further, on said trial that said Patty, in October, A. D. 1833, was taken sick, and for a short time was furnished and assisted with medical advice and attendance by one of the select men of the town of Wallingford, when she partially recovered and was able to be about; the expense of which medical advice and attendance was paid by orders on the town treasurer, drawn by the select men in the usual way. It also appeared that said Patty, as early as the year 1825, commenced going out to work for herself, and continued thus to work at different places till she became sick and deranged; and she did not appear to have become chargeable to the town, except as has been before stated; and that in the year 1833 and 1834, when the said Patty was relieved, as aforesaid, there were three select men in said town of Wallingford and they were the overseers of the poor. The court decided the said town of Wallingford was liable for such supplies and necessities as the plaintiff had furnished said Patty, and the jury returned a verdict accordingly; to which opinion the defendant excepted.

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*Smith and Ormsbee for defendants*—The contract made with the plaintiff by the overseers, is not binding on the town.

Where a poor person, belonging to a town, applies to the overseers for relief, the statute has pointed out the way in which relief may be afforded, and this must be pursued.—Statute Ch. 47 No. 1—See 20, *Lovell vs. Pownall*, Bennington county supreme court, Feb. term, 1833—*Middlebury vs. Hubberton*, 1 Chip. R. 205—*Jamaica vs. Guilford*, 2 do. 103—*Aldridge vs. Londonderry*, 5 Vt. R. 448—*Londonderry vs. Windham*, 2 do, 149—*Essex vs. Milton*, 3 do. 17—12 Mass. R. 333, 452—14 do. 396, 448—4 Con. R. 553—8 John. R. 249, 323—16 do. 281—18 do. 382.

*Linsley and Briggs for plaintiff*.—It appearing from the case, that the town of Wallingford was liable to support the pauper, the only question is, whether the supplies were furnished under such authority as will bind the town?

I. A majority of the select men, as overseers of the poor, are competent to make a valid contract that will bind the town.—Statute 370, 2d sec.—*Middlebury vs. Rood*, 7 Vt. R. 125.

II. The only remaining question is, can the select men, as overseers, make a valid contract for the support of the poor, without an order from a justice of the peace?

1. The statute having required the towns, peremptorily, to sup-

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port the poor, it would seem to follow, that those officers elected for the purpose of performing this duty, must have power to fulfil the obligation resting upon the town. If the select men, as overseers of the poor have not full power to support the poor, then the town cannot do it, for they act only by their agents. To hold that overseers can only furnish such support as a justice may order, is interposing a check upon the action of the town, entirely inconsistent with the obligation resting upon them. The justice being no officer of the town, cannot be, in any manner, controlled by them. The language of the 2d section, requiring the overseers to provide houses, nurses, physicians and surgeons, in such case as they or a majority of them shall judge necessary, &c., is entirely incompatible with the idea that their action is to be controlled by a justice of the peace.

2. The 20th section of the statute is only applicable to those cases where the pauper has never been relieved by the town. The pauper in this case having been before relieved by one of the select men, and his acts adopted by the payment of the bills, no judicial enquiry was necessary to charge the town.

3. The 20th section of the statute is only applicable to those cases where a person has not been supported by the town, but requires some assistance in aid of his own exertions. The 2d section enacts, that every town shall relieve, support and maintain, &c. *Relief* and support are very different things. The 20th section says, that if any poor person shall apply for relief, manifestly contemplates something different from support. The 5th section, imposing a penalty on the overseers in certain cases, omits the word '*relieve*,' because the case to which the section is applicable, obviously contemplates an entire support.

4. If it should be considered that the overseers of the poor can only draw money from the treasury in the manner pointed out under the 20th section, yet it by no means follows that they cannot make a valid contract for the support of the poor.

5. The select men have powers far more extensive than overseers, and are competent to charge the town by their contract.

6. The construction contended for would make the statute wholly inapplicable to numerous cases. A pauper in sickness requires, it may be, a daily charge in its support. What would be an ample provision to-day might be wholly insufficient to-morrow.

7. The construction which the statute has received through the state from its passage to the present time, should be decisive upon

this point; for if it is considered that the meaning of the 20th section is doubtful, yet a construction has been adopted by general consent, which ought not to be disturbed.

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8. The 20th section is merely directory to the overseers, and cannot affect a third person who contracts with them in their official capacities; for they have no means of knowing whether the overseers have obtained the requisite order.

The opinion of the court was delivered by

WILLIAMS, CH. J.—The question in this case is, whether the town is liable for the contract of the overseers of the poor. The undertaking, or promise relied on by the plaintiff to charge the defendant, was made by the select men or overseers of the poor. The authority of the select men is not more extensive, when they act as overseers of the poor, than if they had been elected to the latter office alone. As their power is given by statute, so the extent of their authority is to be learnt from the provisions of the statute. An opinion has been entertained, and has been indirectly asserted in this case, that the powers of the overseers of the poor to bind the town, are unlimited; that, under the second section of the statute for the support of the poor, and designating the duties and powers of the overseers, they may make any contract for the relief, support and maintenance of the poor, and that such contracts will be obligatory on the town. On the other hand it is contended, that, by the 20th section of the same statute, the overseers of the poor are limited in the amount of their expenditures, either to the sum of five dollars, or such further sum as, on a consultation with a justice of the peace, may be ordered by him. As the practice in different parts of the state, under this statute, has been dissimilar, and as it is contended that a practice has very generally prevailed, which would seem to render the 20th section wholly inoperative and useless, it becomes necessary to turn our attention to different parts of the statute, and learn what are its provisions. We might consider the question before us as settled by the authority of adjudged cases. In the case of *Washburne vs. the town of Vernon*, in Windham county, Feb. 1832, a question precisely similar to the one under consideration, was raised and decided by the court; and on the authority of that case, another, in Bennington county, Feb. 1833, of *Lovel vs. the town of Pownal*, was decided. As those cases are not reported, it has been supposed in the argument, that they were decided upon other

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grounds than upon the construction of the section of the statute before named; we have, however, since the argument, in addition to the recollection of those of our brethren who were present when those cases were decided, ascertained that the court decided and intended to decide, that the overseers of the poor could make no promise to bind the town for the support of a person who had not been a pauper of the town, except in such cases as are within the section of the statute before mentioned, or within one or the other of the provisions to that section.

It will be remembered that the obligation of a town to relieve and support the poor, is created by statute. In an individual the exercise of charity is a duty, yet it is one of imperfect obligation. The duty of a town is entirely a legal obligation, and cannot be enforced either between towns, or between a town and an individual, except by statute. The second section of the statute makes it the duty of every town "to relieve, support and maintain their own poor." It requires the overseers of the poor to "relieve, support and maintain all the poor, lame, blind, sick and others, *inhabitants within* such town or place, who are not able to maintain themselves," and to provide suitable houses, nurses, physicians, &c., and also, to take effectual measures to prevent the poor resident within the town from strolling into any other town. This section probably embraces all, or nearly all the cases in which relief is to be afforded by a town. It is evident however that the duty created by this section has not been considered as absolute, so that without any further provisions, an action could be maintained against a town for the support of a pauper, on their neglect to support him. It is true it was at one time held, that an action might be maintained by one town against another, for expenses of supporting a pauper, without an order of removal. This idea has however been repudiated, and the later decisions have been, that no action can be maintained by one town against another for the support of their poor, except under the 4th and 11th sections of the statute. Under the 4th there must be an order of removal, and no part of the expenses for such support, antecedent to such order, can be recovered.—*Londonderry vs. Windham*, 2 Vt. R. 149.—*Essex vs. Milton*, 3 Vt. R. 17. It is also very evident, that an individual can maintain no action against a town for advances made for the support of a person poor and in need of relief, by proving the destitute condition of the person to whom the advances were made, unless there was some contract on the part of the town by their authorized agents. The second section of the statute can therefore have no effect on the question now before us.

The transient person who may be suddenly taken sick, or lame, or be otherwise disabled and in need of relief, does not come within the terms of the 20th section, which provides only for poor persons belonging to any town or district. In the case of the transient poor, the whole duty of providing for their support is laid upon the overseers of the poor, of the town where the person, in need of relief, happens to be; the expenses of which are to be reimbursed by the town or place of such person's legal settlement, or by the relations of such person, liable by law for his or her support.

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It may be doubtful whether the 20th section applies, in the first instance, to the poor who are removed to the town of their settlement, according to the 3d and 4th sections of the statute. Such poor persons are to be lodged with the overseers of the poor of the town or place, to which the removal is had; and by the 5th section, a penalty is laid on the overseers of the poor, who refuse to receive or neglect to provide for the support and maintenance of such persons. These three sections, the 3d, 4th and 5th apply to a particular class of poor. They may be considered as embracing all the provisions which are necessary. As there must be an adjudication by a regular tribunal, which, until reversed or appealed from, decides the question of the settlement of the pauper of his being chargeable or likely to be chargeable, and commencing the relation of town pauper; probably the overseers of the poor, to which the pauper is removed, might provide for the support of such person and make a contract binding on the town, without complying with the requisitions of the 20th section.¶ This question however is not before us in the present case, and the remarks are only made because reliance has been had, by the counsel for the plaintiff, on the provisions of the 2d, 3d, 4th and 5th sections, as having a bearing on this cause. In all other cases of poor persons belonging to a town and applying for relief, and when the relation of town pauper has not commenced, we consider that the 20th section must govern, and its provisions must be complied with, or the town cannot be made liable for a greater sum than five dollars, nor can a sum exceeding that be drawn from the treasury unless upon an order made by a justice of the peace on consultation with the overseers of the poor. To consider this section as merely directory, would render it entirely useless and nugatory, and would be a repeal of the statute. The section is positive in its provisions, and it is prohibitory upon the overseers of the poor as to making any other or further allowance than what shall be directed by the order. It was intended as a limitation on the authority of the

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agents of the town, and also to relieve those agents from the entire responsibility of determining who were the proper objects of the relief, provided for the poor; and of the extent of the relief to be affected. The provisions of this section and the first providing clause are, that if any poor person, belonging to a town, shall apply for relief to the overseer or overseers of the poor, if he is under the necessity of immediate relief, the overseers may draw on the treasurer of the town for a sum not exceeding five dollars for that purpose, without any application to a justice of the peace; but if the necessity is not so pressing, or if a greater sum is wanted, the overseer or overseers of the poor are to make application to a justice of the peace of the county, and the justice, together with the overseer or overseers, are to enquire into the state and circumstances of the persons applying, and if it appears to them that the person is in indigent circumstances, the justice is to give an order in writing to the overseers, to make such allowance weekly or otherwise to such poor person, as they in their discretion shall think his circumstances require; and this order is their authority to draw money from the treasury of the town. To make the town of Wallingford liable to the plaintiff, under the circumstances detailed in the bill of exceptions, would be to enable a majority of the overseers of the poor, to leap over the provisions of the statute, and to charge the town *ad libitum*, for the support of any person they might direct and to any amount. We are confident they had no such power, and that the town are not liable.

The provisions of this section are so plain, it is a matter of some astonishment that they should ever have been disregarded; more particularly, as we find that there has *always* existed in this state, a similar limitation on the authority of the overseers of the poor. By the first statute on the subject of supporting the poor, passed in 1779, Slade's State Papers, 378, authority was given to the select men, as overseers of the poor, when they were chosen, "to expend or disburse, out of the town stock or treasury, what they shall judge necessary from time to time, for the relief and support of any of the poor belonging to their towns, so far as to the amount of ten pounds; and if more be needful, the said selectmen, or overseers, or the major part of them, shall, with the advice of the *authority* of that town, (if any there be,) expend and disburse what shall be by them judged needful for the relief of the poor, as aforesaid." A statute in terms precisely similar had existed in Connecticut. On the revision of our statutes in March 1787, a similar provision was made nearly in the same words, with this difference, that the sum which the overseers were

authorized to expend, without the advise of the authority of the town, was limited to four pounds. In these statutes it was provided, that if there was no justice of the peace in the town, the selectmen or overseers were empowered to act as fully as if they had such advice. Our present statute, which was passed in 1797, limited the expenditures by the selectmen or overseers to five dollars; and further provides that if there is no justice of the peace in the town, the overseers shall make application to any justice of the peace in the county; thus confining their authority as to expenditures at the expense of the town, or to charging the town, to that sum, and no more.

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The result to which we come is, that the overseers of the poor of Wallingford were not authorized to make the contract in question to charge the town; and for that reason, the judgment of the county court must be reversed, and a new trial granted. Whether the circumstances of the case are such, that they will be liable to the amount of five dollars, must depend on the facts which may be made to appear on another trial.

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JOEL STEVENS vs. EZRA WILKINS.

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When a plaintiff prays out a writ, and causes the same to be served, if the officer neglects to return the writ to the justice, no action will lie against the plaintiff at the suit of the defendant for the costs incurred in consequence of such neglect.

This was an action, on the the case. The plaintiff states in his declaration that the defendant sued out a writ against him, which was signed by R. Gibson Esq. justice of the peace, and delivered to Fitch a sberiff's deputy, who arrested the body of the plaintiff, took bail, made his return thereon, and delivered it to Solomon Foot Esq. the attorney of the defendant, whose name was indorsed as attorney on the said writ, and that the defendant did not, nor did any one for him, deliver said writ to the justice at any time before the hour therein appointed for the appearance of the plaintiff, nor within two hours thereafter. The plaintiff then avers that he appeared at the time and place of trial with his witnesses, but the defendant did not appear, nor did the justice before whom the writ was returnable.

To this declaration the defendant demurred generally, and joinder. The court below gave judgment for plaintiff; to which de-

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cision the defendant excepted, and the cause was passed to this court for revision.

*S. Foot for defendant.*—1. The issuing of the writ, was a judicial act, the act of the magistrate, and not of the party. The party had a right to sue out his writ, and it is not contended otherwise, as this is not a suit, for malicious prosecution. The statute, page 136 provides, that if an action be not entered, within two hours, from the time the writ is made returnable, it shall not be entered at all, unless by consent of the parties. If the action be not entered within this time, whether in consequence of the writ not being returned, or the absence of the magistrate, it merely operates as a discontinuance of the suit.—10 John. 367, and defendant cannot recover cost except by obtaining judgment, or nonsuiting the plaintiff.—11 John. 407.

2. It appears from the declaration in this case, that the writ was given to the proper officer, and legal service made by him, and it was his business, his duty, agreeably to the directions contained in the precept, to return it to the subscribing magistrate. It was not enough for him, to send the writ to the plaintiff's attorney to be returned by him to the magistrate. The attorney might or might not attend at the trial. This would not necessarily follow from the fact, of his appearing to be the attorney on the writ. And if such attorney receive the writ from the officer, even with a promise, express or implied to return it to the magistrate, he, no less than any other person so receiving it, acts simply in the capacity of the officer's agent, for a particular purpose. If he fail to return it, his liability is only to the officer, for the non-performance of a special undertaking. The officer's liability, for the non-return of the precept is not discharged. It cannot be shifted from himself, upon his special agents, and least of all, can it be thrown from the officer, upon the plaintiff, the very party presumed to be most injured in such case, for not returning his writ in due season. Whatever may have been the obligation of the attorney in this instance, it could not affect the liability of the plaintiff, especially when no collusion between them is charged.

3. If the defendant be liable at all, upon the facts alleged in the plaintiff's declaration, it can only be for a malicious prosecution. Such is not the present action.

*Mr. Harman for plaintiff.*—1. The plaintiff is entitled to recover upon the general principle, laid down by Sir William Blackstone, and recognized by this court, at their last July Term, that "for every wrong there is always a remedy."



2. It is not a sufficient objection to this action, that the plaintiff may, perhaps, have a claim for damages upon the officer who served the writ in favor of *Wilkins vs. Stevens*. Remedies are frequently manifold; and though the officer may have rendered himself liable to the present plaintiff, yet,

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3. It also appears from the pleadings, that the plaintiff has been aggrieved by the wilful act of the defendant, in receiving the writ from the officer and withholding it from the justice, although he might have delivered it to that magistrate.

Had the writ been returned, the cause might have been continued by another justice.

The opinion of the court was delivered by

WILLIAMS, Ch. J — The declaration sets forth no wrongful act of the defendant, which has occasioned any injury to the plaintiff. If the attorney of Mr. Wilkins was negligent in not returning the writ to the justice, his neglect cannot be considered as the act of Mr. Wilkins, nor can he be accountable for the fault of his attorney in this particular. The deputy sheriff, who served the writ, was bound to return the same, and if he failed to perform his duty, he is liable to any one who has been injured thereby. There is no reason for making the defendant chargeable for a neglect which he neither caused nor procured, and which was probably as injurious to him as to the plaintiff in this action. As this declaration sets forth no facts which can render the defendant liable, judgment must be, that the declaration is insufficient. It is of no importance for us to consider what other remedy this plaintiff may have. He must pursue such other and further remedy as he may be advised will be appropriate to his case. Possibly he might have obtained a judgment for his cost, at the time the writ was returnable to the justice, whether it was returned or not, by entering a complaint for that purpose to the justice; but whether he could or not, is not a question now before us, and has not been considered or reflected on. The judgment of the county court must be reversed, and judgment entered for the defendant to recover his cost.

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1896.

PROBATE COURT *vs.* DAVID MERRIAM.

The settlement of an executor's or administrator's account, before the court of probate, unappealed from, is conclusive upon every subject adjudicated upon. The heirs, legatees or creditors cannot, in a suit on the probate bond, shew as a breach, that the sale of the real estate was fraudulent and in fact sold to the executor or administrator at less than its value, but should have contested the account of the administrator before the court of probate where the administrator was charged with the amount of sales.

Such settlement does not preclude the heirs, legatees or creditors from proving that other property came into the hands of the administrator or executor, of which no account is rendered.

When an executor or administrator is indebted to the testator or intestate, he must charge himself with the amount due from him, if solvent, or it will be a breach of his bond.

*Quere.* Whether, if the executor or administrator was wholly insolvent, a recovery could be had on the bond for the amount of such debt?

A full statement of this case is comprised in the opinion of the court.

*Merrill and Ormsbee for plaintiff.*—It is said in Starkie's Evidence, vol. 1, p. 252, 93d sec. "a judgment, decree or sentence may be impeached by proof that such judgment never existed, or was void *ab initio*; secondly, that it was fraudulent and covinous; and thirdly, that it has been revoked.

The plaintiff in this case offered to prove by parol evidence, that the settlement of his account was fraudulent and covinous; and it is a well settled rule of law and equity, that fraud is an extrinsic, collateral act, which vitiates all transactions, even the most solemn proceedings of courts of justice.—Starkie vol. 2 pages 586-7.

The settlement with the probate court comprehends all the proceedings of the executor in the performance of the conditions of his bond, and it cannot justly be said that we go back to proceedings anterior to the allowance to make out the fraud, when we offer to show that the account allowed by the probate court was false and fraudulent any more than when we offer to show that there was trick and artifice practiced at the time of its allowance, because it is one continued act of fraud. We cannot go back of a judgment to show an usurious contract upon which it was founded.

The bond is an independent security for the faithful administration of the estate. In this case it is alleged in the declaration that the executor fraudulently sold the estate for less than its value and procured it purchased in for his own benefit, and in rendering his account has charged himself with what he gave, but not with the value over and above what he gave. He pleads his administration settlement in bar of the plaintiff's claim for this balance. The

plaintiff denies that he has rendered a true account, and offers to prove that he has fraudulently kept back a part of the estate.—See *Gordon vs. Clapp*, 5 Vt. R. 129—*Warren vs. Powers*, 5 Con. R. 373. Let it be granted that decisions of courts of competent jurisdiction are binding for and against the parties and privies thereto, this rule does not extend to matters that clearly were not directly in issue and were not adjudicated upon.—*Darling vs. Hull*, 5 Vt. R. 91—*Whiting vs. Corwin*, 5 Vt. R. 451—1 Starkie 202—6 Vt. R. 20.

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It is not contended that the same matters decided by the probate court, may be redecided, but it is contended, that, although he rendered an account, he did not render a true account, and the plaintiff seeks a recovery here for what he can prove was fraudulently kept back by the executor and of which no account has been rendered.

Neither can the allowance of the account by the probate court, unappealed from, be construed into a release of the principal or surety in the bond. In the case of a jail bond, a discharge of the principal by a court of jail delivery does not cure a breach of the bond committed before the discharge.—Story's Conflict of Laws, p. 499—Starkie on Evidence, part 2d, sec. 77, 79 to 83—So, in case of a discharge fraudulently procured—6 Vt. R. p. 251, *Richards and Truesdall vs. Hunt*.

*Royce and Strong for defendant.*—The court of probate is made, by statute, a court of record, and has an exclusive jurisdiction, although limited to the cases provided for by statute.

The subject matter of the accounting in this case, was proper to be enquired into by the probate court. Before allowing an administrator's or executor's account, notice issues to all interested, to appear and object to the allowance of such account, and if any one thinks himself aggrieved by the decision of the probate court, an appeal is given.

In this case, then, the probate court had exclusive jurisdiction, and the correctness of their decision cannot be collaterally impeached, or in any way enquired into, except on an appeal taken.—1 D. Chip. 423, *Probate Court vs. Fillmore*—2 Vt. R. 440, *Barker vs. Rogers*—2 Vt. R. 338, *Hendrick and Wife vs. Cleveland*.

The evidence offered was parol, and was offered to impeach that which had once been examined before a court of competent

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jurisdiction and made matter of record. In short, the offer was to impeach the record by parol.

The opinion of the court was delivered by

**WILLIAMS, Ch. J.**—This is an action on a probate bond, executed by the defendant as surety for Isaac Hill and Olive Barnes, executors of the will of Moses Barnes, deceased. Olive Barnes, it appears, declined and Isaac Hill was the sole acting executor. The prosecutors, Zenas Frisbee and Wife, are legatees in the will. Several breaches of the bond are assigned, some of which it will be proper to mention, as on the trial of the issues which were found, whether the executor had rendered a true account of his administration and had fully administered, the prosecutor offered to prove the several matters set forth in the breaches assigned to the condition of the probate bond. Among others were the following, viz. that the executor was licensed to sell the real estate; that he fraudulently sold the same at the sum of six hundred and fifty-six dollars—and was, in fact, himself the purchaser—a sum less than its value, and less than he had been offered.

That the executor obtained a license to sell the personal estate at public auction, and sold the same fraudulently, employing persons to bid for him.

That there were sundry articles of personal property not inventoried, which came to the hands of the executor, and which he had appropriated to his own use.

That the deceased had sundry promissory notes, and among others, some against Mr. Hill, the executor, which had never been inventoried or accounted for, but which had been appropriated to the executor's own use.

On the trial of the several issues which were formed, the records of the probate court were read in evidence, by which it appeared that the executor had settled his account at the probate office. For that reason, the evidence offered by the prosecutor of the several facts before named, was rejected by the county court. It is urged here, that the evidence should have been received, as tending to shew that the settlement of the executor's account before the court of probate was fraudulent. To the proceedings of the probate court, in relation to the settlement of the executor's account, the prosecutors were parties, duly notified; they cannot, therefore, in this suit, impeach that settlement for fraud. They should have applied to the court of probate, who, if they had been imposed upon by the fraud of the executor, would have cor-

rected the error, or they should have taken their remedy by appeal. Nothing decided by the probate court, in relation to the settlement of the executor's account, could be re-examined in this suit.

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The evidence, therefore, in relation to the sale of the real estate to the executor, was inadmissible. On the return of the order of sale, it was competent for the prosecutor to have proved that the sale was made, in fact, to the executor, and under such circumstance, that he ought to have been charged with the full value of the land, instead of the sum for which it was nominally sold; but not having appeared and offered this proof, the probate court having had the subject before them and passed upon it, and no appeal having been taken, it was too late, on the trial of this cause, to bring forward that evidence.

Upon the same principle, any sum which has been allowed to the executor by the court of probate, cannot again be a subject of controversy.

But the settlement of the executor's account was not conclusive, as to every thing antecedent to the time of the settlement; nor as to property received by the executor, belonging to the testator, for which he neglected, either through accident or design, to render an account. It is the duty of executors and administrators to render a true and full account of all the property of the deceased which comes to their hands. They hold the same only as trustees for the creditors, heirs or legatees. In their account they should charge themselves with all the property received. The amount as well as the particulars are known to them, but cannot be as well known to others. There is no possible reason, therefore, why an account rendered which is not a true and full account, should protect them from any further investigation, at the instance of those interested. It has been decided in a neighboring state, that if there be errors in the account of an administrator, executor or guardian, which has been rendered by him and settled at the probate court, the parties will not be concluded by the decree on such account, although not appealed from; but the judge of probate, at any time before the final settlement of the estate, may revise the account and correct the error upon the settlement of a subsequent account. Upon the same principle, we apprehend, that if the executor, administrator or guardian neglect, or fail to render an account to the probate court for adjustment, of all the property by them received, it is a breach of the conditions of the bond. The evidence that sundry articles of personal property of

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the testator came to the hands of the executor, and was not inventoried, and no account rendered therefor, was admissible and should have been received. So also should the evidence in relation to the promissory notes, and particularly the promissory notes against Mr. Hill, the executor, if he rendered no account therefor. It has been several times decided in Massachusetts, that an executor or an administrator, who owes a debt to the deceased, will, by accepting the trust, be considered as having received the debt, and he and his sureties on the administration bond will be liable for the amount of such debt, in like manner as if he had received it from any other debtor of the deceased.—11 Mass. R. 256—12 Mass. R. 199. Without deciding that we should, in all cases, consider the administrator or executor and his sureties liable on their administration bonds, as decided in those cases, particularly if the administrator or executor were wholly insolvent, we consider, that when the executor or administrator is solvent, it is his duty to inventory and account for any notes or obligations which the deceased held against him and which were due and payable. It has not been claimed in this case, that by making Mr. Hill executor, the testator intended to release or discharge the debt as against the legatees in the will, and no question of that kind has been raised.

In the particulars mentioned, the settlement of the executor's account was not conclusive, and it was competent for the prosecutors to give evidence to charge the executor and his sureties for any property or money received by him, of which no account was rendered.

The judgment of the county court must therefore be reversed.

WILLIAM APPLETON *et al.* vs. MELZER EDSON.RUTLAND,  
February,  
1836.

A presumption against the title of the mortgagee, arises from mere lapse of time, in favor of a stranger.

Where the possession has been vacant, courts will not presume any thing against the legal estate.

Where an administrator held a mortgage for the benefit of the heirs, he may make a valid conveyance to the heirs, notwithstanding an adverse possession in a stranger.

This was an action of ejectment for the recovery of a lot of land in Mendon, drawn to the right of Moses Wheelock, by him deeded to Ephraim Wheelock, who executed a mortgage deed of the same to Wm. Sullivan and Jonathan Amory of Boston, in the capacity of administrators of James Cutter, formerly of Boston, deceased, given to secure the payment of a certain bond. The latter deed was dated September 10, 1799, and the bond described in the condition, September 2, 1799. The substance of the condition was the payment of \$1136 57—one moiety June 1, 1800, and the other moiety one year thereafter. It appeared from the record of the court of probate, in the district of Suffolk, Massachusetts, that Amory and Sullivan were duly appointed administrators, and had fully settled their administration account, and been decreed to distribute to the widow and heirs the balance in their hands. It was also in evidence that the plaintiffs were the only heirs of James Cutter—that Amory was dead, and Sullivan the surviving administrator. After the introduction of this evidence, the court decided, that as a matter of law, the presumption was *prima facie* that the bond was paid, and that it would be the duty of the jury, there being no proof to the contrary, so to presume. The plaintiffs then introduced a deed from William Sullivan, surviving administrator upon the estate of James Cutter to these plaintiffs. It was admitted that the defendant was in possession of the premises at the time of the execution of the deed, and at the time of the commencement of this suit, claiming adversely to the plaintiffs (i. e.) under a vendue or collector's deed of the premises. The court decided that the deed was void, and therefore a verdict was found for the defendant. To the decisions of the court the plaintiffs excepted.

*Mr. Ormsbee for the defendant.*—In this case, the mortgage under which the plaintiffs claim, was of such ancient date that the presumption of law is that it has been paid.

The deed under which plaintiffs make out their title is as to the

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defendant in possession at the time of its execution, and claiming adversely, void.

*Mr. Smith for plaintiffs.*—The court cannot, in this case, presume the title of the mortgagees under which the plaintiffs claim extinguished.

1. On the non-payment of the mortgage money at the time fixed in the condition, the title became absolute in the mortgagees. The mortgagor became a tenant at will, and cannot acquire a title by possession or lapse of time as against the mortgagee.

2. The statute (page 170) has prescribed the mode in which satisfaction of a mortgage must be acknowledged, and in the absence of this, it cannot be presumed.—Stat. ch. 18, §11.

3. If the court are at liberty to presume satisfaction of the mortgage, mere lapse of time is not sufficient to warrant that presumption.—Pow. Mort. 160.—1 Mad Chan. 519, 120.

Nothing is said in the case as to the possession—*Non-constant*, the mortgagee has had it.

4. The presumption of satisfaction cannot be made but in favor of the mortgagee, or some one claiming under him. The defendant is a stranger, and shews no title but mere naked possession.—*Dee vs. Cooke*, 19 Com. Law Rep. 46.—5 Pet. Cond. Rep. 241.—1 Paine Rep. 467, 470.

The plaintiffs' deed was not void on the ground that defendant was in adverse possession of the premises, at the time it was executed. It was a conveyance of the trustee to the *cestui que trust*—a uniting of the legal and the trust estate—the possession and the use, and does not come at all within the act passed to prevent fraudulent speculations.

But allowing the deed to be void, the plaintiffs being *cestui que trust*, can maintain the action without it. The Statute of Uses (27 Hen. VIII. ch. 10) is in force in this state, and by virtue of it the plaintiffs have the possession. Where the common law is adopted, this statute is recognized as a part of it.—1 Swift's Dig. 122—1 Con. Rep. 354—1 N. H. Rep. 232—3 do. 261, 264—4 Mass. Rep. 135—6 do. 31—10 John. Rep. 456—18 do. 261, 264—3 Bin. 595—5 Pet. Rep. 241.

When a court of equity would compel a trustee to convey, or it is his duty to convey, the court direct the jury to presume a conveyance.—4 Term Rep. 682—7 do. 2—5 do. 682—11 John. R. 91, 97, 446, 456—13 do. 513—10 do. 475—9 do. 171—7 Wheat. Rep. 59, 109, 112, 113—6 do. 504.



The formal title of the trustee cannot be set up as against the *cestui que trust*.—3 Bur. Rep. 1398, 1901—1 Vt. Rep.—Cowp. 43, 46—19 Com. Law Rep. 44, 46.

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The opinion of the court was delivered by

REDFIELD, J.—The first question raised here is, whether this defendant, being a stranger to the title, can claim to show by mere lapse of time a bar to the plaintiffs' right of action, on the mortgage debt, in order to defeat his recovery in this action? It is true, no doubt, that the lapse of time in this case being more than twenty years, is, unexplained, sufficient to bar all recovery upon the *bond*. It is also true that the mortgage is but an incident to the *bond*. But it is never true that mere lapse of time will raise a presumption of payment of the *debt*. If the possession has all along been vacant, no presumption in relation to the payment of the debt or the title would arise; but this circumstance of itself would be sufficient to rebut any such presumption.—*Jackson ex dem. vs. Pierce*, 10 John. 417. The same is true where the possession of the mortgaged premises is in a stranger.—*Jackson ex dem. vs. Slater*, 5 Wendell, 295. And in the latter case it was held that the possession being in a stranger, did tend to raise a presumption that the mortgagor had abandoned in favor of the mortgagee.

It is a well-settled principle that when a conveyance or release is presumed from lapse of time, this presumption is made in favor of the legal estate, and to *quiet* always, but never to *disturb* a possession. An eminent judge once said, "he would presume *any* thing which might be necessary to quiet so *long a possession*."—Hence if the mortgagor continues in possession twenty years after condition broken, it will be sufficient ground of presuming payment of the mortgage debt, unless interest or rent have been paid in the mean time.—*Jackson ex dem. vs. Wood*, 12 John. R. 242. If the mortgagee has been in possession, a release of the equity of redemption will be presumed. Deeds and conveyances of every kind almost, and sometimes against all rational grounds of belief, for the purpose of quieting a long possession, and preventing injustice from some technical lapse have been presumed, but never in favor of a stranger, or of a vacant possession, or against the legal title, which in this case has all along been in the plaintiffs' grantor.—Hence we feel clear that no such presumption could arise in the present case.—2 Williams' Saunders, 175, and cases referred to.—*Higginson vs. Wain*, 4 Cranch, 415—2 Pet. Cond. 155.

A second question was decided in the court below, and has been here very elaborately discussed, and as it is important to the final

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determination of the case, the court have passed upon it. The question is, whether the deed from William Sullivan to plaintiffs is void by reason of an adverse possession. This being a deed from the *cestui que trust* to the trustee, the plaintiff being heir to the estate, of which Sullivan was administrator, and the mortgage originally having been taken to secure payment of a debt due the estate, it is only such a conveyance as a court of equity would have compelled the parties to have made. And in every case where the conveyance is by operation of law, as by levy of execution (1 D. Chip. Rep. 139) or sold by Marshall of the United States, (Aldis adm'r of Gadcomb *vs.* Adams, Chit. Co. Jan. T. 1836,) or where Chancery would compel a conveyance, as was some years since held in a case decided in Bennington County, not yet reported, in any such case, if the parties make a conveyance, it is not rendered void by reason of an adverse possession at the time in a stranger.

We feel very certain then that the case under consideration is not within the spirit and intention of the statute declaring conveyances void by reason of an adverse possession. This statute is only in affirmance of the doctrine of the common law. The object of this prohibition seems to have been to prevent speculations in "choses in action," or in other words, "the sale of law suits."—Hence where the conveyance is to one in possession, the statute does not operate. And as between the *cestui que trust* and trustee, after the statute of 27 Henry VIII., called the Statute of Uses, the statute transferred the legal to the equitable estate with the possession, and thus there was no need of a conveyance. And without reference to the doctrine of the Statute of Uses, a conveyance of the legal estate to him who is beneficially interested, is good to convey the legal title, notwithstanding an adverse possession in a stranger. This is not among the class of cases intended to be reached by the statute, as it never required livery of seizin.

The judgment of the county court is therefore reversed, and a new trial granted.

## BENNINGTON COUNTY,

FEBRUARY TERM, 1836.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice*.

"	STEPHEN ROYCE,	} <i>Assistant Justices</i>
"	SAMUEL S. PHELPS,	
"	JACOB COLLAMER,	

## GILBERT BRADLEY vs. SOLOMON BENTLEY.

Parol evidence is inadmissible to contradict, vary, or add to a written contract.

This was an action on the following promissory note executed by the defendant to the plaintiff.

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" \$22 50.

Sunderland, Dec. 23d, 1833.

One year from date I promise to pay G. Bradley or bearer, twenty-two dollars and fifty cents for value received, with interest.  
(Signed,) SOLOMON BENTLEY."

*Plea*.—Non assumpsit, with notice of the following facts :

On the trial the defendant offered to prove by parol, the following facts, to wit, that said note was given for a stove sold and delivered by the plaintiff to the defendant on the day of the date of said note, and at the same time it was agreed between the parties that at the expiration of a year from the date of said note, the defendant might elect to pay the amount specified in said note, or to return said stove to the plaintiff in satisfaction or payment of said note, and pay him six dollars for the use of the same.—That the defendant did, at the expiration of the year, elect to return said stove, and did take the same to the plaintiff's store, and there tendered the same with six dollars in specie to the plaintiff, which he refused to receive ; and the defendant left the stove at the plaintiff's store, and kept said specie, and brought the same into court and deposited it with the clerk. To the admission of which parol evidence the plaintiff objected, but the same was admitted and a verdict and judgment rendered for the defendant ; to which the plaintiff excepted, and the cause passed to this court.

*Smith for the plaintiff*.—The court ought not to have admitted the testimony of a parol agreement at the time of the execution of

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the note. Parol testimony cannot be received to contradict, add to, or vary a written agreement. The written instrument is considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol. The distinction made in the trial below that parol testimony is admissible to prove an independent collateral agreement for the payment of a note in a particular way, and made at the time of the execution of the note, is not at all sustained by the cases, *Ransom vs. Walker*, 1 Star. Cas. 361—*Kee vs. Hawkins*, 8 Taunt. Rep. 89—*Mosley, assignee of Robinson, vs. Hanford*, 10 Barn. & Cris. 731—*Rich vs. Jackson*, 4 Bro. Ch. Ca. 515—*Powell vs. Edmunds*, 12 East. 6—*Hoare vs. Graham*, 3 Camp. 57—*Meres vs. Ansell*, 3 Wils. 275—*Lord Verbmure vs. Morris*, 2 Bro. Ch. Ca. 19—*Mease vs. Mease*, Cowp. 47—*Graves vs. Ashlin*, 3 Camp. 426—*Barber vs. Brace*, 3 Conn. Rep. 9—*Tkompson vs. Ketchum*, 8 John. Rep. 146—1 Phil. Ev. 437, 439—3 Star. Ev. 1002—5—7—*Bradley vs. Anderson*, 5 Vt. R. 152—*Brown vs. —*, 1 Chip. Rep. 227.

*Bennett for the defendant.*—The evidence offered was properly admitted. It was not offered to contradict the note, but to show a distinct independent collateral agreement whereby the note might be satisfied. There is no rule of law excluding such evidence, but it is settled by frequent decisions to be admissible.—1 D. Chip. R. 365, *Sanders vs. Howe*—5 Vt. R. 520, *Farnam vs. Ingraham et al.*—3 Stark. Ev. 1002, note 1—2 Dallas, 171, *Field vs. Biddle*—15 Mass. R. 85, *Davenport vs. Mason*.

The evidence shows an accord and satisfaction. To exclude this evidence, would do great injustice to the parties, and would sanction the attempts of the plaintiff in committing a fraud upon the rights of the defendant in attempting to collect the note in violation of his own agreement.

The opinion of the court was delivered by

COLLAMER, J.—There is hardly to be found in the science of law, a principle more uniform and inflexible in its application than the rule in the law of evidence that a written contract is the highest and most conclusive evidence of the minds of the parties on that subject, *at that time*; and therefore it cannot be contradicted, varied, controled or added to by parol evidence. Such evidence is never received but in case of *fraud*, (which is to show that in fact it never was a contract) or in case of latent ambiguity. (If the instrument is complete in itself, and would have an effective ope-

ration, the parol testimony is never received to give to it any other operation.) This principle has been adhered to by the courts of common law with a long and unusual uniformity, and decisions and elementary writers might be cited on this point to an extent in number and time greater than on almost any other. That courts sometimes, pressed with an extreme case of hardship arising on the operation of a principle wholesome and salutary in its general effect, have never made an anomalous and contradictory decision, is not to be expected; but they are uncommonly rare, on this point. It is true that the courts have admitted evidence of a *subsequent* parol contract embracing the prior written one, and thus superseding it. This must be on new consideration independent, collateral, and furnishing redress to the party, or it must be executed and its performance *actually received*, when it amounts to accord with satisfaction. The decisions on these subsequent, independent collateral contracts, embracing and controlling the written ones, have been pressed into the service and made to sustain the doctrine that the written contract is subject to being thus controlled generally; and the distinction that such is never the case except by *subsequent* contract, which is not at war with the general principle, has been, in some few instances, disregarded. It is also to be noticed, that satisfaction, *actually received*, is always a defence; and in such case it is immaterial whether the accord, or agreement to receive, was cotemporaneous or subsequent to the written contract. In some very few cases, the distinction that satisfaction actually received is a defence, has been lost sight of, and the decision seems to look as if the *accord* previous to or simultaneous with the contract shown by parol, actually *controlled* it, when in truth it did not, but only the subsequently *receiving the satisfaction*. This rule is, however, a *rule of evidence*, and therefore it may be waived by the party for whose security it is made. Like estoppel, it must be insisted on in proper season by the party, and in a proper and legal manner, or it is waived. This accounts for another class of cases, not uncommon in the books, not unfrequently pressed on courts improperly to sustain the principle for which the defendant here contends. Among these cases is *Barney vs. Bliss*, (2 Aik. 60,) in which it was holden that by traversing instead of demurring to a plea, which alleged the written contract sued on to have been made by *mistake*, the plaintiff waived the rule of law, that this fact might not be proved by parol. Also the case *Noyes vs. Evans*, (6 Vt. R. 628,) where the defendant made no objection by demurrer or otherwise to the action being sustained by parol evi-

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dence, and was therefore cast in his cause. Parol proof has also been admitted to rebut legal *presumptions*, and is undoubtedly admissible to show the written contract was never in fact delivered, and was a mere escrow. Under one of these general principles may all the cases on which the defendant relies be accounted for.

(It is perfectly obvious that to sustain this defence, we must directly admit a written contract, perfect and unambiguous, to be varied, added to and controlled by parol evidence of a cotemporaneous understanding, and when no satisfaction has been actually received, producing a discharge; and to admit this directly against objection seasonably and regularly interposed. This we consider as directly contrary to established and wholesome law, notwithstanding the suggestions contained in *Farnham vs. Ingraham*, with which the court below was pressed. It must be obvious, if this testimony is admissible, and this defence can be sustained, by the same principle, any note however apparently valuable in the consideration or execution, of which no defect or fraud is even suggested, is subject to being utterly controlled by parol evidence on the tender of a pepper-corn.)

Judgment reversed.

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IRA DAVIS vs. SETH BARTON.

Where B. owed D., both on note and book, D. commenced two suits, one on book and one on note. B. filed a declaration in offset on book to the action of D. on note. Held, that, in such case, B. could not apply his account on the note in this manner.

Davis commenced two actions against Barton at the same time; one on book, returnable to the county court, and one on two notes of hand, before a justice of the Peace. This last action was by Barton appealed to the county court, and there he filed thereto his plea in set off on book, which is the last entitled case above mentioned. In the county court, both in this action on book in favor of Davis and this plea in offset in favor of Barton, were sent to the same auditor who made therein two reports. In the first cause he reported that Davis' account was entirely for labor to the amount of \$221 15. That he had credited Barton all Barton had charged him except a certain charge of 50 cents, and had also credited Barton much that Barton had not charged. Copies of the

accounts were annexed. He further reported the following facts: Previous to 13th July, 1833, Davis had labored for Barton 14 months and was to receive part in cash and part in barter pay—that, at said date, the parties settled the cash part of the contract and Barton gave Davis a note of \$15 for the balance thereof then due. The barter part remained unsettled. They then contracted for another year's labor, the pay to be as before. It was also agreed between them, that if either of the parties became dissatisfied, he might close the contract. Previous to the expiration of the year, Davis, fearing he should not get his pay for his labor, requested security of Barton who refused to give it. Davis then commenced this suit and labored no longer. During the term of service Barton had paid Davis several sums, part of them cash and part barter, all of which Davis credited on book, and part of which Barton had charged. It did not appear that any directions were given at the time of the payment of said sums, as to their application, but on trial Barton claimed that the cash payment should apply on the aforesaid note of \$15, and Davis claimed that it should apply in account with the other payments towards his labor. The auditor did apply it in account and found a balance in favor of Davis, on book, of \$101 89. As to the declaration in offset on book in favor of Barton against Davis, the auditor reported that Barton had no cause of action, that his whole account had been allowed already by deducting it from the account of Davis in his action on book. In the county court exceptions were filed to these decisions of the auditor, but the county court accepted both said reports and rendered judgment for Davis in both cases, to which Barton filed exceptions, and the causes passed to this court. These two cases were heard together.

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*Swift for the defendant.*—In relation to the first case insisted, 1st, It is believed and contended that the said auditor greatly erred and mistook the principles of the law in making his said report, particularly in the allowance of the plaintiff's charge for 11 months and 16 days' work. As it appears from the said report that the said work was performed under a contract made between the plaintiff and defendant, that the plaintiff should labor in the employment of the defendant for the term of one year, at the rate of \$150 per year, or as stated in the account, at \$12 1-2 per month; and it also appears from the said report, that previous to the expiration of the said year, the said plaintiff, without the consent or even knowledge of the defendant, quitted the employ-

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ment of the defendant, abandoned his labor, and instituted this suit ; and although it appears stated in the said report, that it was agreed between the said parties, that if either of them became dissatisfied, he might close the contract—but how that auditor gained a knowledge of this agreement, whether by intuition or otherwise, he does not state—yet such an agreement, if made, ought to have a reasonable as well as legal construction, and it could not be supposed, that it was meant to be extended beyond a fair and suitable trial. But however that might be considered, the law would doubtless imply and impose the duty upon the party who became dissatisfied, to give a reasonable notice to the other party, before he could so close the contract ; and as it does not appear in this case, that he ever gave any such notice before he left the defendant's employment, except a claim or requisition for security, made by him upon the very day on which he so left, which does not appear to be warranted by the terms, nor form any of the stipulations of the contract or agreement between them ; and it also appears, that on the very same day, without any other notice, he not only left the defendant's employment as above, but also actually instituted and commenced, not only this suit, but also one other suit, (where one would have answered for all his claims) which it is further contended, that he could not have done before such notice nor during the subsistence of that contract, or before the expiration of the year or the said term of service contracted for.—1 Sw. Dig. 197—6 Vt. R. 39, *Hair vs. Bell*—12 John. R. 165, *McMillan vs. Vanderlip*—Do. 273, &c.—13 John. R. 53, *Thorpe vs. White et al.*—Do. 94, *Jennings vs. Camp*—Do. 390, *Webb vs. Duckingfield*—Mass. Cases, &c. &c.

It is also believed and contended, that the said auditor erred and mistook the law in allowing to the plaintiff the whole amount of his account ; whereas it appears by the said report, that a part thereof was, by the agreement of the said parties, to have been paid in barter or collateral articles of property by the defendant ; and it also appears from the said report, as claimed and contended by the defendant, that there was no evidence adduced before him, nor any pretence on the part of the plaintiff, that the defendant ever declined or refused the payment of the said barter or collateral property, or that the same was ever demanded of him by the plaintiff, any further than what was paid to him, &c.

In relation to the case of *Barton vs. Davis*, Mr. SWIFT remarked :

In this case it is believed and contended, that the auditor, in



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making his report, hath erred and mistaken the rules and principles of the law, in disallowing, or rather rejecting the plaintiff's account, as it appears from his report and a simultaneous report made and presented by him in another case between the same parties, to which he therein refers, that the only reason for his said disallowance or rejection, was that the said Ira claimed, at the time of the hearing or trial thereon had before him, that the said account of the plaintiff should apply upon or in payment of his the said Ira's book account against him the said Seth, for labor and services by the said Ira, claimed to have been performed by him for the said Seth, and upon which he, the said Ira, had instituted his suit against the said Seth, then pending, without any agreement having been made between the said parties anterior thereto, or any previous notice given by the said Ira to the said Seth to that effect, or that the same should so apply, although the said Seth had, long antecedent thereto, claimed or signified his intention as to the application thereof, and pleaded the same in offset to a suit also brought by the said Ira against the said Seth, and also then pending on two promissory notes, and in payment of which the said Seth claimed that the articles claimed in this case were originally intended to apply to the amount and in satisfaction of the same, and that his declaration in this case was with the view to the application of his said offset, which facts were stated and made known to the said auditor at the time of the hearing previous and the making of his said report, and so, as he considers, therein substantially appear.

That the rule of law, as claimed and contended by the plaintiff, is, that where delivery or payment of money or other articles of property are made by one to another, he who pays or delivers the same hath a right to direct as to their application at all times, if no agreement between the said parties and no application hath been otherwise made.

And it is also considered by him as a settled rule, authorized and warranted expressly by statute, that where there are mutual accounts existing between two parties, each hath a right (unless otherwise agreed) to bring and sustain his several and separate suit upon their respective accounts, and to treat them as entirely independent, and that one is no bar or abatement of the other.—See Stat. p. 138—also 2 Sw. Sys. p. 171.

*Mr. Sargent for Davis.*—First in relation to the case of *Davis vs. Barton*, the report shows a claim for services at a stipulated

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price, and it is objected that the plaintiff's action is prematurely brought.

That difficulty is obviated by the usual stipulation, that either party might end the contract at pleasure, by which it stands as any other contract for services, the law implying a promise to pay. And if the plaintiff *was* bound to receive barter pay, he had already received it.

As to the monies credited, we claim, that inasmuch as the defendant did not elect to apply them on the notes at the time of payment, the plaintiff had a right to apply the same towards his labor and credit accordingly—2 Vt. Rep. 283. *Briggs vs. Williams et al.*

In relation to *Barton vs. Davis*. This is a declaration on book, plead in county court in offset to a suit on note, claiming the same items credited in the book action, *Davis vs. Barton*, except a single item and that not supported by proof.

No honest motive could have prompted this declaration whilst a book action was pending in the same court between the same parties.

The auditor found it was the original intention of the parties to apply these items in offset to the claim of Davis, where he had honestly credited them.

The opinion of the court was delivered by

COLLAMER, J.—As to the case on book, *Davis vs. Barton*, several questions are started. It is insisted that Davis could not sustain the action, inasmuch as he had not labored out the last year, for which he contracted, before his suit was commenced. The auditor however reports that it was further agreed between them, that either party could end the contract at his own pleasure; therefore Davis had the right to do so *unconditionally*, and he so did. But it is further to be observed, that Davis' account for his two first years' labor was fully due and unsettled, except the money part which was put into note. This was a sufficient foundation for the action when commenced, and even the last service was fully due before the auditor's setting, and by the very terms of the statute he must include all accounts *then* due. It is next insisted, that Davis was to receive part in barter pay, and that such part ought not to be included in the report and judgment, as it was not due when suit was brought. It appears by the report, that Davis was to receive part in barter pay, but what part does not appear. It seems by the report and account annexed, that he received

over one hundred dollars in pay other than money, and that he was bound to receive any more does not appear, and this court always accept and render judgment on a report unless it appears wrong. If Barton had the right to make payment, further in collateral or specific articles, it must have been at the end of the service, in July 1834. It must, therefore, have been all overdue when the auditor made his report, and was, therefore, properly included.

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In relation to the case of *Barton vs. Davis*, Barton had some account against Davis, all of which Davis had credited on account to him. When Davis commenced his two suits, Barton pleads his account in offset to the action on note with a view to overbalance that and cast Davis in a bill of cost. This is not a case within the statute where a defendant, in book debt action before a justice, is permitted to sue for his account which has not been allowed him by a plaintiff. In this case Barton's account was all credited by Davis. Nor is this a case where Davis actually owed Barton a balance on book and so Barton needed to take measures for his own security ; for it fully appears that Barton owed a balance to Davis. Nor had Barton any right to apply his account or any part of it on the note, where it was not so directed at the time of delivery. Had such been its direction on delivery, it would have been *payment*, not matter in account, and would have been good on a plea of payment or on the general issue, but could not have been proper in account. The moment Barton insists upon it as matter in account that settles it as not a payment or application on note, and leaves it in account, of which no application can be made until a *balance* in account is found. That *balance* could be found only on examination of the whole accounts between the parties. This balance turns out to be against Barton, and whether so found on an audit on the suit on book or on the declaration in offset on book, it is equally fatal to Barton applying any thing on the note.

Judgment affirmed.

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BLISS vs. ARNOLD, LEGGITT & LAPHAM.

When a commission merchant is directed to sell for cash, he is accountable to his employer, if he delivers the articles sold without receiving the pay therefor, and cannot be protected by any custom, existing among commission merchants, to deliver such articles and wait for the pay in a week or ten days.

A want of alleging a special demand when necessary is cured by verdict.

*Quere*—Whether a motion in arrest can be sustained when the trial of an issue in fact is by the court.

This was an action on the case, and the plaintiff declared as follows:—

“For that the plaintiff, at the city of New-York aforesaid, on, &c., at the special instance and request of the defendants, delivered to the said defendants a certain cask of cheese, and the defendants did then and there undertake, promise and agree with the plaintiff that they would sell the said cask of cheese for cash—that they would pay the plaintiff for the same when sold, after deducting 2 1-2 per cent. from the price of the said cask of cheese, which 2 1-2 per cent. as aforesaid was agreed on as the full consideration for the expense and services of the said defendants in effecting the sale aforesaid; and the defendants did then and there further agree that if they sold the said cheese on time, they would guarantee the payment to the plaintiff, in which last mentioned case they would charge for the expenses and services 5 per cent., and no more, on the sum for which the said cask of cheese should be sold; and the plaintiff further says, that at the time he delivered the defendants the cask of cheese aforesaid, he instructed the said defendants that if they sold the said cheese on time, they must guarantee the payment to the plaintiff: and further, that the defendants did then and there afterwards, to wit, on or before the 15th day of May, 1833, sell the said cheese to one Townsend Carpenter on time, for the sum of \$23 33 cts., thereby giving the said Carpenter time, viz. one or two days to pay for the cask of cheese aforesaid, whereby the said defendants, on the 15th day of May, 1833, become liable to pay the plaintiff the sum of \$23 33 cts., after deducting the 5 per cent. for their expenses and services as aforesaid; which sums, though often requested, the defendants have refused, and still do refuse to pay.”

*Plea—General Issue.*

On the trial of the issue joined between the parties in the aforesaid cause, on the part of the plaintiff it was proved that at the time of the delivering of the said cheese to the said Arnold, Leggitt & Lapham, they were commission merchants in the said city of New-York, and received the said cheese of the plaintiff to sell on commission, under instructions that if they sold said cheese on time, they must guarantee the payment of the same to the plaintiff,

and might and should retain in their hands as a compensation therefor, a commission of five per cent. on the amount of the sales; and if they sold for cash, they should retain a commission of 2 1-2 per cent. on the amount of sales so made, as a compensation therefor; and that the cask of cheese in question was not sold on time, but was a cash sale.

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The plaintiff further gave in evidence two letters of the firm of Arnold, Leggitt & Lapham—the one containing an account of the sales of the cheese so consigned to the said Arnold, Leggitt & Lapham, and the other explanatory of their account,—also proved that he demanded pay for the cheese in controversy, before the commencement of this suit, and the evidence on the part of the plaintiff having been closed—

The defendants gave in evidence the the deposition of Townsend Carpenter, who testified, that in December, 1832, he purchased of the defendants three casks of cheese—that according to his uniform custom, and all other merchants in the city of New York, he took the cheese to his store and sold it—that within two or three days, one of the defendants called upon him, and requested payment, which was not made—that the defendants called again—that he finally became insolvent, no part paid, and his property was sold by the sheriff; but that he was in good credit when he purchased the cheese.

The joint deposition of S. H. Herrick and H. Ten Broek, who were commission merchants in country produce, stated—

“The business of selling for cash is conducted in the following manner: The purchaser for cash, takes the article into his possession, and to his own store, (if it is in the city,) for the purpose of examination, and to collect the cash which he is to pay within a few days of the sale. The usual time of collecting cash payments in New-York, with commission merchants, varies from twenty-four hours to a week succeeding the sale. It is our belief that it would be difficult, if not impossible, to conduct cash sales on any other principle. In New-York, there must be some confidence between man and man in dealing; and to require cash at the very moment of delivery, would impede and interrupt much the merchants' business.”

The court decided that this teirce of cheese in controversy was sold for cash by the defendants, and that the defendants had been guilty of negligence in not receiving or securing the pay therefor at the time of the delivery of the same to Carpenter, or within a reasonable time after, and that the plaintiff was entitled to recover

**BENNINGTON,** the amount of the sales of one cask of cheese to the said Carpenter, after deducting a commission of 2 1-2 per cent. on the amount of the sale, and rendered judgment for the plaintiff accordingly.—  
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**Arnold et al.** To which decision of the court the defendants excepted.

The defendants also made a motion in arrest of the verdict for insufficiency in the plaintiff's declaration.

To the decision of the court overruling this motion, the defendants also excepted.

*Mr. Sargeant for the plaintiff.*—On the motion in arrest, we insist that the defendants are too late with their technical objections to the declaration.

The rule is now well settled, that facts imperfectly stated or omitted, will (after verdict) be presumed to have been shown on trial.—1 Chit. Pl. 402.

2dly. On the subject of customs, they must be certain—must be proven, and construed strictly.—1 Bl. Com. 78.

We insist that the case shows no certain custom, and that the case comes within no custom attempted to be shown.

Again : All local customs must be specifically pleaded.—1. Bl. Com. 75-6—1 Chit. Pl.

*Mr. Bennett for the defendant.*—1. It seems the court found the fact that the cheese in controversy was sold on a cash sale, but there is no pretence that the defendants have ever received pay for the same.

2. Are the defendants responsible to pay the amount of the sale to the plaintiff? We contend not.

By the terms of their instructions, the defendants were either to sell for cash or on credit ; and if they sold on credit, they were bound to guarantee the payment.

In this case it seems they sold on credit, and upon a cash sale, and conformed to the usages of commission merchants on cash sales, in permitting the buyer to take the property into his custody before paying for it.

The usage is to collect the moneys on cash sales from twenty-four hours to a week succeeding the sale.

In this case it seems the sale was the 26th of December, 1832—that within two or three days thereafter, Carpenter was called upon by Leggitt for the pay, but said he could not then, but would hand it in at the defendants' store in a day or two ; but that he, Carpenter, was unable to do it, and in ten days from the time of the sale, his property was seized on a *fi. fa.* He failed, and has never paid or been able to pay the same since that time.

The defendants in this case were justified in conducting this business according to the usage of commission merchants. This usage was impliedly adopted by the parties—2 Stark. Ev. 453—5 Bin. R. 287.

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In what way are the defendants responsible? Have they not used ordinary diligence?

3. It is contended under the motion in arrest, that the declaration is bad, and that the defects are not cured by verdict.

1. The consideration of the promise is not set forth.

2. There is no special damage alleged in the declaration, which is necessary before bringing suit.—Law Pl. 188, 189, 190.

3. This defect is not cured by the verdict.—Cro. Eliz. 85—1 Saund. 33, note 2—Com. Dig. Title Pl. 69—Law Pl. 194.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—We are all of opinion in this case, that the judgment of the county court should be affirmed. The defendant was justly held accountable for the cheese in question. It is found that the defendant and his partners were commission merchants—that they received the cheese to sell; and that they sold it for cash, and were negligent in not getting the pay therefor. If there was a loss, by the failure of the men to whom the cheese was sold, the loss should fall upon the defendant and not on the plaintiff.

In all sales for cash, the money must be paid when the property is delivered. It is wholly inconsistent to claim that a sale for cash means a sale on a credit for a week or ten days. If the commission merchants in New-York have adopted such a custom as was contended for and testified to, it must be for their own accommodation, and cannot be recognized as obligatory on those who intrust to them property to be sold for cash. We cannot believe there is any such custom recognized as law, and we find a decision of Judge Gardner, at the circuit in Monroe county, in the case of *Graves vs. Hendrick & Smyth*, directly opposed to any such custom as binding upon the person who intrusts property to a commission merchant.

On the motion in arrest, which was overruled in the county court, it may be remarked, in the first place, that it is doubtful whether any motion in arrest can be sustained when the issue is tried by the court. The court having the whole case before them, it is supposed they would not render judgment on a declaration wholly defective. A motion in arrest is to prevent a judgment, and is filed after a verdict and before judgment. Where the court

**BENNINGTON,** tries the issue of fact, the finding the issue and rendering the judgment is done at one and the same time. But on examining the declaration, we do not discover any defects not cured by a verdict.

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A sufficient consideration is stated in the compensation or commission which the defendant was to receive. The want of alleging a special demand was a defect, but would have been cured by a verdict. Without proving such a demand, the court would not have permitted the jury, nor would the jury have given a verdict for the plaintiff. It is true, the want of stating a special demand, when it is necessary, has been holden bad on a general demurrer, and it has been decided, that it would not be aided by a verdict. The authority of those cases is questionable, and in the case of *Bowdell vs. Parsons*, 10 East. 359, the want of alleging such request was held not a sufficient objection in arrest of judgment. When the issue is tried by the court, we are very clear that the objection ought not to prevail in arrest.

The judgment therefore of the county court must be affirmed.

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**JOHN BALDWIN vs. RUPERT.**

**BENNINGTON,** If an overseer of the poor, in binding out to apprenticeship a child chargeable to the town, covenant that such child shall faithfully serve out the term, the town is not liable for the breach of such contract.

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This was an action of covenant broken. The declaration in substance alleged that on the 18th of January, 1825, by a certain deed of indenture of apprenticeship, made by Thomas Sheldon and Seth Moore, overseers of the poor of Rupert, on the one part, and the plaintiff of the other, signed, sealed, &c.—the said overseers did apprentice to the plaintiff, one A—— L——, a poor boy, then chargeable to said town, of nine years of age, to serve and dwell with the plaintiff until he should attain the age of twenty-one years; during all which time it was covenanted and agreed, on behalf of said town, that said A—— L—— should faithfully serve the plaintiff; to which covenant the said overseers, by the authority in them vested, did bind said town.—That said A—— L—— entered upon said service, but afterwards, in January, 1833, without cause, departed the plaintiff's service, and has ever since remained absent, to the plaintiff's damage, &c.

To this the defendant pleaded, first, *Non est factum*—second, after oyer of said indenture, performance on the part of the defendant. Issue.



On the trial in the county court, the plaintiff showed that the overseers executed said indenture, and said A— L— entered on said service, and left the same as alleged, but showed no other authority in the overseers than such as the statute created.

The court decided that the plaintiff was not entitled to recover, and rendered judgment for the defendant; to which the plaintiff excepted, and the cause passed to this court.

*Bennett for the plaintiff.*—The question in this case is, whether the town of Rupert are bound by the covenants in the indenture executed by the overseers of the poor. We contend they are.

1. By the 2d section of the act relating to a legal settlement and support of the poor, (page 370,) every town is bound to support and maintain their own poor: And by the same section it is made the duty of the overseers of the poor to relieve, support and maintain them. But on whose account and at whose charge?—Most certainly the town. The overseers in this, act as the agents of the town.

2. By the 18th section, (page 377,) the overseers of the poor are empowered to set at work all such children as are chargeable to such town, in the work-house or elsewhere, or bind them apprentices, as they shall think best. But on whose account are they to be set at work? and at whose expense? and on whose account are the overseers to bind them out? Most clearly the overseers act in behalf of the town, and as their agents in this business.

The overseers of the poor in this business, do not act as the agents of the law, as is said by Judge Swift in his Digest, (page 62.) The fact is simply this:—the agency is created by the law; and when the overseers act, they act as the agents of the corporation, and in their behalf. As well might you say, the overseers, in supporting and relieving the poor, and in setting them at work in the town's work-house, act as the agents of the law, and not of the town.

3. We think the overseers are empowered by the *act itself* to bind out such children as are chargeable to the town, for and in behalf of the town, and as the legally constituted agents thereof, and if so, it would follow that the town is responsible on its covenants. The act itself declares, "such binding shall be good and effectual in law to all intents and purposes.

*Smith for the defendant.*—It is very apparent the town is not liable to the plaintiff for the desertion of the apprentice. In binding out poor children, the overseers are the agents, not of the town,

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but of the laws. They are empowered by the statute to bind the apprentice and not the town, and of course can insert no covenant on the part of the town.—Stat. Ch. 47, No. 1, Sec. 18—1 Swift. Dig. 62. In this case there is no covenant to be found in the indenture, making either the overseers or the town responsible for any act of the apprentice.

The opinion of the court was delivered by

COLLAMER, J.—It has been uniformly and repeatedly decided that the general provision in the statute that each town shall provide for its own poor, &c., creates no liability. The statute proceeds to particulars, and provides the cases and the manner in which liability arises, exists, and is to be enforced. To these cases is liability confined, or to express and special contracts made, by the towns or their agents thereto fully authorized.

In this case, it is indeed alleged that the overseers made this covenant for the town, by authority; but on trial, no authority was shown but such as arose by law out of their holding the office. It is true that the overseers had, by the statute, authority to bind out the apprentice, and undoubtedly such act is binding on all concerned, including the town, so far as to create the relationship of master and apprentice. When the law confers this power on the overseers, it confers with it all the power *necessary* to carry that into effect, and no more. But it is not necessary or incident to the power of binding an apprentice that covenants for fidelity in the apprentice must be added. The exercise of such a power without limitation or control, would be of dangerous tendency: Hence it was not given by enactment, and should not be by construction.

Judgment affirmed.

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SAMUEL C. RAYMOND vs. ADMINISTRATOR OF THE ESTATE OF  
EZRA ISHAM.

Interest allowed on a merchant's accounts when he sells on a credit, after the time of credit has expired.

No interest allowed on mutual accounts when there is no stipulated period of credit, and when the balance may vary from time to time.

This cause came to the county court upon an appeal from commissioners, and tried upon facts agreed upon, to wit:

That the account on the books of said Raymond, deducting the credit, amounts to	\$467 90
And the account on the books of E. Isham, deducting the credit, amounts to	150 97
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Isham.

Leaving a balance as principal,	\$316 93
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We find the accounts of the parties commenced in 1816, and continued in mutual deal until the year 1830. The account of the plaintiff is for merchandize, and that of E. Isham is for services as a physician.

If interest is to be cast on the running account, after the usual time of credit up to the present time, it will be the sum of two hundred and fifty-seven dollars and three cents, which is to be added to the above balance.

If interest is to be cast from the close of the dealings between the parties, it will amount to the sum of \$95 79. It is further agreed that it was the known custom for Mr. Raymond to charge interest on accounts after six months, but no express promise or contract was ever made between the parties for the payment of interest, or any conversation respecting it whilst said account was accruing, and that no statement of said account was furnished to said Isham, or evidence to show that said Isham was particularly apprised by said Raymond that he should charge interest, to his recollection. It is further agreed that said Raymond, at several times, called on said Isham for the settlement of their respective accounts, but the same was postponed, because one or the other of the parties was not ready.

On the trial it was contended on the part of the defendant, that from the law arising from the facts agreed upon, the plaintiff was not entitled to recover for any sum for interest, in addition to the principal of his account; and the court decided *pro forma*, and by consent of parties, that the plaintiff was entitled to recover the sum of \$257 03, for interest in addition to his balance of principal, making in the whole \$573 96. To this opinion of the court the defendant excepted.

*Mr. P. Isham for defendant.*—It appears from the case that the respective accounts of the parties commenced in 1816, and was continued in mutual dealing to the year 1830. There was never a liquidation of the account by the parties—no statement of the same ever furnished to either, and no contract ever made for the payment of interest, or any conversation in relation to it. In such case the rule in England has been uniform, that interest can-

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not be recovered; and the rule is not varied by a sale at 3 or 6 months. Such sale, says Lord Ellenborough, means "that the vendee shall not be called on for payment, but that it is still a contract for the payment of goods, on which interest cannot be recovered.—1722, *Bunbury R.* 119—1730, *Barns' cases* 228, *Pinock vs. Willett*—1771, 3 *Wilson R.* 205, *Blanby vs. Hendricks*—1806, 6 *Esp. N. P. R.* 45, *Charlis vs. Duke of York*—1810, 2 *Camp. N. P. R.* 429, *Gordon vs. Swan*—Do. 12 *East. R.* 418, *do. vs. do.*—1812, 15 *East. R.* 223, *Carlton vs. Bragg*—1825, 6 *B. & C.* 715, *Shaw vs. Pictors*.

The rule is the same in chancery, on a devise for the payment of debts; though interest will be allowed on simple contract debts, it will not be on book accounts.—14 *Viner Abj.* 457—3. *Chan. R.* 64, *Dolman vs. Pritman*—2 *Atk. R.* 110 *Lloyd vs. Williams*—3 *Vesey R.* 134, *Parker vs. Hutchinson*—3 *John. Ch.* 587.

In this country the same rule has been adopted in relation to open, mutual and unliquidated accounts, and interest has always been refused.—*Pennsylvania*, 1 *Dall.* 265, *Henry vs. Risk*—Do. 315, *Williams vs. Craig*—*Virginia*, 2 *Hen. and Mump.* 603—2 *Call. R.* 358—*Kentucky*, *Hardin* 518, *South vs. Leany*—1 *Bibb* 325, 446, *Harrison vs. Handley*—*S. Carolina*, 4 *M'Cord R.* 392, ——— *vs. Magrath*—*Massachusetts*, 2 *Gall R.* 45, *Gammill vs. Skinner*—12 *Mass.*—*New York*, 12 *John. R.* 158, *Kane vs. Smith*—6 *John R.* 45, *Newell vs. Griswold*—2 *Wend. R.* 501, *Wood vs. Hickok*—7 *Wend. R.* 178, *Doyle vs. St. James's Church*—3 *Cowen R.* 419, *Glass Factory vs. Reed*—*Vermont*, *Bray R.* 133, *Houghton vs. Hagar*—2 *Vt. R.* 539, *Bates vs. Starr*—5 *Vt. R.* 177, *Catlin vs. Aikin*.

It appears that it was the general custom of Mr. Raymond to charge interest after six months. This, however, is not a universal custom among merchants. Some charge from date, others from three, six and nine months, others still charge or not charge, depending on the nature of their dealings and the probability of the continuance of their custom.

There exists nothing between the parties that shews that such a claim was ever contemplated,—no payment of interest on former settlements and the like; neither did Mr. Raymond ever apprise the defendant that he charged interest on his accounts. But whatever may be his custom, this can never prevail against the general rule of law, unless it is such a general custom as by which all are bound, and such as exists between the English and American trade.—1 *Dallas R.* 265—2 *Wend. R.* 501.

There was no demand ever made for payment of the account, though it appears Mr. Raymond requested a settlement of their respective accounts, or requested to have their accounts liquidated, but this was mutually postponed by the parties.

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Interest is generally allowed where the accounts are balanced by the parties after it becomes due.—6 Ep. R. 45. And if the court should be of opinion that interest should be cast, it is claimed that it can be allowed only from the close of the dealings between them.

*D. Robinson jr. for plaintiff.*—It is a general rule, where it is known to be the custom of merchants or others to charge interest on their accounts after a certain time of credit, the law will presume the purchaser, or person for whom services are rendered, promises to pay such interest.—1 Con. R. 32—Swift's Digest 714.

When goods are sold, to be paid for at a certain time, interest ought to be allowed after that time.

The time of credit given by Mr. Raymond was six months, and this was known to defendant, the *reason* of the foregoing rule is applicable to the present case.

Where articles are delivered or service performed and charged on book, and *no time* is agreed on when payment should be made, yet if it appears from the nature of the transaction, that they were to be paid for in a reasonable time, and payment is *unreasonably* delayed, interest will be recovered as damages.

In this case the expected time for payment is spring and fall, and payment was unreasonably delayed, and especially as the plaintiff called several times on defendant for a settlement of their respective accounts.

The above rules have been universally followed in this state and in Connecticut.

We have not followed the English and New York practice on this subject.—*Bates vs. Starr*, 2 Vt. R. 539.

The *implied promise* to pay interest is as binding as an express contract to pay interest.—*Swift*.

The fact that the plaintiff does not recollect that he particularly apprised defendant, that he should charge interest, or that any conversation respecting interest passed between them, does not preclude the idea, that defendant knew Mr. Raymond's custom of charging interest on account after six months.

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It was not necessary to make and furnish defendant a *statement* of the account to entitle] plaintiff to interest. He called on defendant several times for a settlement, and it was his own neglect that he did not know the balance due.

Again, if partial payments are made, interest will be allowed on the balance, though the accounts are unliquidated.—*Swift*.

Are there any facts in the case that rebut the presumption, that the defendant was to pay interest? Defendant knew the plaintiff exacted interest on his account after six months.

Does the fact, that the account commenced in 1816 and continued until the year 1830, imply that the plaintiff did not mean or expect to exact interest as on other accounts. Could the defendant consider that, because plaintiff neglected to sue him, that he was to *give in the interest*?

The fact tends to prove the contrary, that the plaintiff calculated to receive interest as in other cases.

There is nothing in the case from which it can be presumed that the balance was *constantly varying*, sometimes in favor of the one and sometimes in favor of the other; but from the large balance due plaintiff, the contrary is to be presumed.

That the defendant was a physician is not such a fact, as we conceive, from which it could be presumed that the plaintiff did not expect to exact, and the defendant did not expect to pay interest.

If then it was the known *custom* of Mr. Raymond to charge interest on his accounts after six months, it must be considered to be the understanding of the parties, that interest should be paid accordingly.

The case in *Brayton*, 134, was decided on the ground that it was not the *custom* in England, where the goods were bought, nor in Montreal, where the goods were to be paid for, to exact interest; and the law of England would not enforce it.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The question in this case is, whether the plaintiff is entitled to interest on his account.

By the rules or practice of the English courts, interest probably would not be allowed in a case similar to this, although there is no subject on which the law is more unsettled. It is considered by some of their elementary writers, that there is, at this day, no settled law upon the subject of allowing interest. In the case of *Bates vs. Starr*, 2 Vt. R. 536, it was observed, that the rule in relation to interest in the English courts and in the courts of the

state of New York, had not been adopted here. Our practice is more conformable to that which prevails in the state of Connecticut.

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Where a merchant sells goods by retail, on a credit of three or six months, or a year, those who deal with him are expected to settle and pay the balance due at the expiration of the time of credit. A contract to pay interest on whatever may be due from the expiration of this time of credit, may therefore be implied. The customers of the merchant are supposed to be acquainted with the time of credit, as they can by enquiry easily ascertain it. The prices at which the goods are sold are, in some measure, regulated by the credit given. In the case under consideration, from the practice which has generally obtained in this state, from the known usage and custom of Mr. Raymond, as well as of other merchants, to cast interest on their accounts after six months, we think there was an implied contract on the part of Dr. Isham to pay interest after the usual time of credit. Considering the case as governed by the implied contract, no interest would be recoverable where there were mutual accounts and dealings between two, and no stipulated period of credit, and when the balance might continually vary. In such a case, the inference from the dealings between the parties, would be, that no interest should be cast on either side.

The judgment of the county court, which was for the largest sum, is therefore affirmed.

## WINDHAM COUNTY,

FEBRUARY TERM, 1836.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice*.

"	STEPHEN ROYCE,	} <i>Assistant Justices.</i>
"	JACOB COLLAMER,	
"	ISAAC F. REDFIELD,	

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JOHN C. BRIGGS *vs.* GUILFORD.

Towns are bound to repair injuries to roads and bridges as soon as may be, but this term is to have a reasonable and practicable construction, and the repair is to be made as soon as the magnitude of the work, the opportunity of procuring materials, and other circumstances necessarily connected with such a work will admit.

*Quere.*—Are towns bound to open, when practicable, any by-way around a bridge, while repairing?

If such by-way be voluntarily opened by the town, they are bound only to make the same as safe and good as the temporary purposes for which it is made would reasonably require.

Injuries in any measure owing to the plaintiff's want of ordinary care, are not the foundation of an action.

This was an action on the case for special damage to the plaintiff from the insufficiency of a certain public highway and bridge in Guilford. *Plea*, general issue, and trial by jury.

The plaintiff introduced testimony tending to show that he was travelling with a horse and chaise on the stage-road through Guilford, on the 24th of June, 1834. When he arrived at Broad Brook in said town, he found the bridge across said brook gone, which bridge it was admitted Guilford was bound to maintain; that therefore he turned into a way on the adjoining land leading down the bank and across said stream around said bridge—that this way was opened by the owner of the land, on the occasion and under the circumstances hereinafter mentioned—that the same, immediately after leaving the highway, necessarily descended a steep bank into a level plain—that the way down this bank was about nine rods long, and of an elevation of from 12 to 14 degrees.—It was a dug-



way into a side-hill, and the only guard on the lower side consisted of logs and timbers from 12 to 15 inches diameter, placed and secured by stakes on the lower side of said road.—The down-hill end of each timber was laid upon the upper end of the timber below, and so continued the whole length of said hill, with some sticks or stones laid occasionally under said timbers. In descending this hill with his chaise, both the horse and chaise of the defendant went off over said muniment, and were precipitated down into the plain, 12 or 14 feet, and the chaise thereby much broken and damaged.—The plaintiff introduced testimony further tending to show that the dug-way might have been made longer, and the elevation thereby reduced, at a few dollars' expense; but on this point, the testimony was contradictory.

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The defendant introduced testimony tending to show, that on the 25th day of May, 1834, an unusual and extraordinary freshet took place on this stream, occasioned by a sudden and violent rain. On the next day in the morning, being Monday, the selectmen of Guilford were out: one of them, on the way, came to this bridge, and finding the same gone, applied to a Mr. Gale, the owner of the adjoining land, to open his fences and proceed to arrange this by-way in such manner as that people might get along while the bridge was rebuilding: This had been done, whenever the bridge was repairing, for forty years past.—That thereupon Gale opened his fences, and men and teams were procured, and this dug-way was completed and used.—That said selectman then, after leaving said request with Gale, proceeded to meet the other selectmen, who proceeded to examine the damages occasioned by the freshet. They found the damage extensive: nine bridges across said stream were carried off in that town—the highways greatly injured, and in one place 60 or 70 rods of road entirely gone.—They there laid out a new highway—put some of the minor bridges in immediate contract, and got some people at work, and near night returned to the bridge in question, and endeavored to contract for the same, but did not succeed. They inserted in the next Brattleboro' paper, which was published on Saturday, that all the bridges not previously let by private contract, would be let at public vendue on Wednesday of the next week; and on Wednesday, June 5th, this bridge, with all the others not previously contracted, were let out to be erected. This bridge had never before been carried away by freshet; but now, though the same had been rebuilt but two years before, one of its stone abutments was swept off, and the soil near six feet below. Gale, who contracted to rebuild said abutment at

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\$186, commenced drawing the stone the next day after he took the contract ; and as soon as the water had subsided sufficiently, he employed hands and kept three or four men constantly laying the stone, which was as great a number as could be conveniently so at work ; and he drew the stone from thirty rods to a mile, and kept the stone-layers constantly supplied until the abutment, which was twenty-one feet high and contained forty cords of stone, was completed, which was on the 3d day of July ; and the wood-work, being prepared, was immediately put on, and the bridge rendered passable on the 4th day of July.—The whole expense of this bridge being about four hundred dollars, and the whole damage to the roads and bridges in that town, near three thousand dollars.

The defendant also introduced testimony tending to show, that the plaintiff was informed of the condition of this road and bridge / before he arrived there, and conducted with imprudence in his mode of descending said hill.

The plaintiff requested the court to charge the jury, that if the bridge was carried away by a freshet, the town were by law required to rebuild the same as soon as might be.—That if they delayed for the mere purpose of consulting their own convenience or profit, they were negligent and liable for damage occasioned by want of the bridge.—That if they used all proper diligence in building the bridge, but in the mean time made a road across the stream elsewhere for the public travel, and used it themselves, such road was a highway within the statute ; and they were bound, while it was kept open, to see that it was sufficiently safe.—That if they allowed it to be of greater elevation than was necessary, or in case the elevation could not be avoided—did not provide a sufficient railing to prevent accident, they were liable.—That if the injury happened in some measure by the conduct or management of the horse, when it could not be rationally expected to have happened, if the road had been properly made and guarded, the town were liable.

But the court declined so to charge the jury, but did charge them as follows :—It is the duty of towns to make and keep their highways and bridges in good and sufficient repair—safe for the traveller—using ordinary care and prudence ; and if special damage arise from insufficiency or want of repair, the town is liable. It seems that the bridge was providentially destroyed on the 25th day of May. This bridge, it was the duty of the town immediately to rebuild with as much dispatch as the magnitude of the work, under the existing circumstances, would reasonably permit. The

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town was not bound to rebuild it with a dispatch which was entirely inconsistent with, or utterly regardless of economy and their own interests; nor were they to consult their own convenience only; but were bound to rebuild it immediately—using all that diligence which the importance of the road, the magnitude of the work, the difficulty of procuring materials and other circumstances necessarily connected with such a work would reasonably permit. If the town were guilty of neglect in the performance of this duty, and thereby the plaintiff was compelled to seek his way around the bridge, and in so doing, using ordinary prudence, he was injured, the plaintiff is entitled to recover.

It may perhaps be questionable, whether, if the town use immediate and reasonable diligence in the repair of sudden and providential injuries to roads and bridges, they are bound to make any temporary by-ways to be used in the mean time, or thereby to assume new and additional duties or liabilities by such act of gratuity.

This town did, however, open and repair a by-way around this bridge, on which by-way this injury happened. In inquiring whether this way was sufficient, or out of repair, the jury will consider the occasion for which that way was opened—the length of time and nature of travel for which it was expected to be used. If the way was as sufficient and in as good repair as was reasonably demanded for such purpose and occasion, then the town are not liable. But if that way was not even sufficient for the occasion for which it was made and used, the jury will inquire whether from such insufficiency the plaintiff has been injured. If the injury is in whole or in part owing to the plaintiff's want of using ordinary care or prudence, then he is not entitled to recover: but if this way is found insufficient and out of repair, as before explained, and the damage accrued to the plaintiff thereby, then the town is liable to pay the same.

The jury returned a verdict for the defendant, and the plaintiff filed exceptions, whereon the case passed to this court.

*William C. Bradley for the plaintiff.*—There being no question made in the case as to the general liability of the town to repair the bridge, and in the mean time the road, the questions raised relate to the *extent* of the liability in regard to each.

1. *As to the Bridge*—The plaintiff contends that the obligation was to repair immediately if practicable, and that if the town delayed in so doing, it was at their own risk; and for damages happening during that delay, by reason of the insufficiency of the bridge,

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the town was liable.—That the practicability of rebuilding the bridge was settled by the ultimate repair, which in that respect made it a question of time only.—That the town having delayed providing in the actual repair for the space of at least 11 days, it was of itself such negligence as made them liable, especially if the public travel was suspended, or during that time turned down a declivity.—That this delay was not excused by waiting to advertise for building-jobs in a newspaper to be printed six days afterwards, because such jobbing was wholly unnecessary, and if permitted in such cases by law, not to be indulged to the extent of the delay.

2. *As to the Road.*—The plaintiff contends that the town, being obliged to keep it in repair, it was (while the obligation existed) placed on the footing of all other legal roads, viz., sufficiently safe for all the travel which usually passed on the stage-road thro' the town.—That from 12 to 14 degrees of declivity was of itself unsafe; and only to be excused by the impracticability of making it lower, and single timbers of 12 to 15 inches diameter each, with one extremity on the ground and the other on the timber below throughout the declivity, was not a sufficient safeguard on the lower side; and that after the request to the court, the attention of the jury ought to have been called to both these circumstances.

3. *As to both Bridge and Road.*—That if the injury happened under such circumstances that there was good ground to find that it would not (without wilfulness on the part of the plaintiff) have happened if the road had been in repair, the plaintiff was entitled to recover.

*John Phelps for the defendant.*—The question in this case arises upon the charge to the jury. Of this we think the plaintiff has no right to complain. The charge restricted the jury to find, if they found for the defendant, 1st, That the town proceeded to rebuild with all proper and reasonable dispatch, governed only by an economy not inconsistent with, or utterly regardless of their own interests.—2d, That the temporary way was as sufficient as was reasonably demanded for the occasion. Or if they found otherwise upon either of these points, they must find, 3d, That the injury was in whole or in part owing to the plaintiff's want of using ordinary care and prudence.

Any thing short of the doctrine laid down on the first point, would compel the town to erect a bridge of unsuitable materials, and of too frail a structure.—Any thing short of that on the second, might, and in the very instance in question would, have been an

impossibility. For how are the rocky and precipitous banks of our rivers to be safely passed without bridges? But, while a bridge is in building, a temporary way is all that can be had: and the character of this must be regulated entirely by the character of the precipice to be surmounted, and not at all by the common standard for ordinary highways; and of this every traveller is bound to take notice, and govern himself accordingly, at his peril. The charge then was correct on both points, and there was sufficient evidence given to warrant the jury in finding according to the charge. But if there was not, they then found, agreeably with the charge, that the party injured was himself in fault.

It must be borne in mind, that the way in question was through a private enclosed domain.—That it must be made under license of, and when the owner chose to direct, if made at all; or else by such outlet used for the occasion, time out of mind, if there be one.—*Com. Dig. Tit. Highway, 1 Rol. Ab. 390.*—That the town had no way to compel the owner to give a license, either to have his soil dug down, or the way extended contrary to his pleasure.—That the traveller on such an emergency must be content with such accommodation as the owner chooses to give, or, or go back and take some other more safe road round the obstruction, at his election. If he chooses to encounter the obstruction, he must know the discipline and ability of his beast at his peril; and is bound to direct and govern both his beast and himself—not with imprudence, certainly; but with all the ordinary care, skill and prudence of a careful and prudent man. And the measure of care and prudence in such case is not to be governed by that which would be necessary and proper upon an open, unobstructed, finished highway; but by that which would be required in getting over, or around an obstruction upon a road or bridge then actually under the process of repair. Upon an open road left as finished, it might be deemed prudent management and ordinary care not to hold up a horse under full trot; or even on a proper occasion, greater speed. But when a bridge is swept away, and a large gulf opened, and workmen all about employed in rebuilding, and the traveller otherwise specially notified of the perils of the occasion, he must not persist to continue his unbroken speed, nor to ride over the dangerous gulf, if to ride would increase the hazard; nor to direct his restive beast with his own imprudent or unskilful hand; nor refuse aid when tendered to him.

Such, among other facts, were given in evidence; and we may suppose even stronger ones, when the plaintiff, in drawing up his

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case, states, *that he conducted with imprudence in his mode of descending the hill.* Can it be said then, in this case, *that the party injured is in no fault?* But the jury peradventure found that he was. The court charged, if the evidence would warrant it, they might so find; and *that such would be a defence to the action.*—And so is the settled doctrine of the law.—1 Vt. R. 357—4 Mass. R. 423.

The opinion of the court was delivered by

COLLAMER, J.—The first complaint relates to the charge of the court as to the delay in repairing the bridge. How soon a town shall rebuild a bridge, is certainly not an abstract principle of law. The statute indeed provides that it shall be done *as soon as may be.* But *how soon* it may be done, obviously depends on a great variety of circumstances; and to these considerations, the attention of the jury was properly directed by the court, and with the terms of the charge this court are satisfied.

The next complaint relates to this by-way, and the duty of the town in relation thereto. This court are not so happy as to be unanimous in opinion on the duty devolving upon towns as to opening temporary roads on such occasions; nor do we find it necessary to lay down now any rule on that subject. It is the plaintiff who now complains. If by law the town was under no obligation to open this temporary way, for convenience, perhaps the selectmen doing it was an act of supererogation, extra official, and created no liability in the town in relation thereto; and in such case, the plaintiff has no occasion to complain of the charge which was given. But assuming that the town were bound to open this way, or that they, by their selectmen, assumed this, voluntarily, still this court is satisfied with the measure of duty laid down by the court in their charge, and we see in it no error. That part of the charge which required of the plaintiff the exercise of *ordinary care*, and excluding him from the recovery of damages for any injury to which his *neglect* of ordinary care contributed, is in pursuance of the case *Noyes vs. Morristown*, with which the court are satisfied. Indeed in such case, how could it be said the injury was occasioned by the want of repair in the road?

Judgment affirmed.

## WILLIAM ADAMS vs. NEWFANE.

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The proceedings in the county court in relation to laying out highways and appraising the damages thereby occasioned, can be revised in the supreme court only by *certiorari*.

Adams, through whose land a highway had been laid by the selectmen of Newfane, applied to a justice of the peace, according to the statute, to appoint men to appraise the damages occasioned him. The appraisal was made, and it exceeding forty dollars, the proceedings were returned to the county court, where objections were made and heard on behalf of the town. The county court overruled the objections and established the return, and made order for the payment of the money. To which proceedings of the county court the town filed exceptions, and the cause, on motion, passed to the supreme court.

After argument,

The opinion of the court was delivered by

COLLAMER, J.—The statute provides the course to be pursued by any one aggrieved by the laying a highway upon his land, without allowing him sufficient therefor. He is to apply by petition to a justice of the peace, who is to notify the selectmen, and proceed in a certain way to appoint a committee, who are, on oath, after notice, to make an appraisal of the damages, and make return of the same to the justice, who, if the sum does not exceed forty dollars, and if sufficient cause is not shown to the contrary, is to establish the proceedings, and make order for the payment of the money: and if the sum exceeds forty dollars, he is to certify the proceedings to the county court, who are directed, if sufficient cause is not shown to the contrary, to “*establish the return*, and make order for the payment of the money.” These proceedings are not by the course of common law: they are entirely in the nature of proceedings of a court of sessions. There are no pleadings, issue, evidence or trial by jury or judgment. It is the same as the appointment of committees by the county court to lay out roads, and the accepting their reports, which proceedings are not subject to revision but upon *certiorari*.

By the statute of 1824, issues of law, demorrsers, in the county court might be *appealed* to the supreme court, and questions arising on *jury trials* only were to be subject to exceptions and removal to the supreme court. This left questions arising issues of fact tried *by the court*, by consent of parties, unprovided for except by writ of error. By the statute of 1828, all questions of law de-

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cided *on the trial and hearing of any cause*, were permitted to be carried up on exception. This was to remedy the former defect, and now includes demurrers and exception on issues to the court; making this course co-extensive with writ of error in civil causes. But it covers no more than a writ of error, and is in terms confined to the trial of causes. In this case it was not the trial of a cause, any more than the acceptance of any report of committee is so.

The proceeding, in this court, dismissed.

*J. Roberts for Adams.*

*R. M. Field for Newfane.*

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### TOWN OF PUTNEY vs. GEORGE BELLWS.

When a plaintiff sues before the county court for a certain number of penalties, in all amounting to over one hundred dollars, and on trial gives evidence only of a number not amounting to that sum, and there is no evidence tending to prove any more, or that any more had been incurred, the county court should dismiss the cause for want of jurisdiction.

A statement of the case, so far as necessary to apprehend the points decided, is included in the opinion of the court.

*Mr. Keyes and Bradley for defendant.*—The statute 1821, (Comp. Laws 139) enacts that, with certain exceptions which are therein enumerated, “any justice of the peace within his sphere is authorised to hear, try and determine all actions of a civil nature, when the debt or matter in demand does not exceed one hundred dollars.—See to jurisdiction of county court, C. L. 119.

The 15th section of the listers’ act of 1825 makes it the duty of “the listers” to require security to the satisfaction of “such listers,” for the payment of taxes from the keeper of a stallion brought into any town, or proof to the satisfaction of “such listers,” that he is set in the list of another town; and in case such person shall fail to give such security, or produce such proof within ten days after “such requirement,” the keeper or owner shall forfeit and pay to the treasurer of such town five dollars for each mare to which such stallion is put during the season.

1. This action is one of a civil nature. In *Harris vs. Bullock*, (Brayton 141) the court decide, that as usury is “expressly” called an “offence” in the statute relating to interest, they must consider as a criminal action, a suit to recover a penalty therefor.



But the principle would not avail the present plaintiff. Neglecting to shew a paper or inability to procure a bondsman, are neither offences or crimes, and the use of the horse in the mean time is not even prohibited by the act.

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But the case last mentioned has been overruled in one of the northern counties. Debt for \$20 was brought before a justice, for cutting out or defacing the marks or brands on cattle. It was objected, that the county court only had jurisdiction, and the objection was overruled.

As the act, (C L. 460) expressly calls the party wilfully cutting, the "person so *offending*," we must consider the case in Brayton no longer authority.—See remarks as to debt for penalties and forfeitures, 3 B. Com. 161. A suit, for penalty under *bribery* act, not *criminal* action.—4 T. R. 758—and a *Quaker* can testify in such an action.—1 Cow. 391.

2. The matter in demand was necessarily less than \$100, and the proof disclosed no fair pretext for claiming more than \$75.

It is certain in its nature and not like the valuation of property or services, variable or a subject of estimate.—*Morrison vs. Moore*, 4 Vt. R. 264—*Bates vs. Downer*, 4 Vt. R. 181—*Ladd vs. Hill*, *ib.* 164—*Southard vs. Merrill*, 3 Vt. R. 321.

3. If this act be of a criminal nature, it is for fifteen separate crimes, each requiring a penalty of *five* dollars, and therefore within a justice's jurisdiction.

Is any man, guilty of twenty-nine instances of profane swearing, indictable at the county court?

Little *crimes* cannot be blended to make one great one and change the tribunal.

In civil suits small claims are allowed to be joined, though it change the jurisdiction, because the "*action*" is not cognizable elsewhere. But if "*criminal matters*" are capable of being tried below, the county court cannot touch them.—6 L. 119—*Keyes vs. Weed*, 1 Chip. R. 380—2 Chip. R. 90.

*Mr. Crawford and Mr. Kellogg for plaintiff*.—1. The plaintiff insists that the county court had jurisdiction of the subject matter.—1 Chip. R. 208, *Gale vs. ———*.—3 Con. R. 553, *Newton vs Danbury*—3 Vt. R. 321, *Southwick et al. vs. Merrill*—4 Vt. R. 170, *Ladd vs. Hill*.

2. The act of David Crawford, one of the listers, in giving notice to the defendant to give security for the payment of taxes,

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or produce proof that said horse had been set in the list of some other town, was sufficient.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This was an action of debt, brought to recover several penalties under the 18th section of the listers' act. By that section, the keeper of a stallion, if he neglects to comply with the requisites of the statute, forfeits the sum of five dollars for each mare the stallion shall be put to and cover during the season. The plaintiff, in his declaration, sets forth, in distinct counts, as many penalties as would give jurisdiction to the county court. On trial he proved that the horse went to fifteen mares *and no more*, and no proof was offered that he went to any other. On trial the defendant's counsel insisted that the county court had no jurisdiction and requested the court to direct the jury to bring in a verdict for the defendant. The court were probably correct in not charging the jury as requested; but whether they should not have dismissed the case for want of jurisdiction, is deserving of consideration.

The statute of 1820 authorized every justice of the peace to hear, try and determine all actions of a civil nature, except in certain cases where the debt or other matter does not exceed one hundred dollars. In all actions of a criminal nature, the jurisdiction of the justice is limited to those cases where the fines or forfeitures do not exceed the sum of seven dollars. It is the nature and not the form of the action which determines the jurisdiction. This principle was decided in the county of Grand Isle, in a case not reported, but which was correctly stated and referred to by the counsel for the defendant. A justice of the peace has jurisdiction to the amount of one hundred dollars, in all actions to recover penalties similar to those for which this action was brought.

Taking it for granted that the rule adopted in the case of *M Farland vs. M Laughlin*, 2 Chip. 90, applies to actions to recover penalties, where the whole amounts to over one hundred dollars, the enquiry will be, whether, in this case, when it was rendered certain that the penalties amounted to seventy-five dollars and no more, the county court had jurisdiction. This case cannot be compared to those where the damages are uncertain, liable to be varied by proof, and in which the *ad damnum* would determine the jurisdiction; nor is it like those where the suit is brought for several penalties, and evidence is offered tending to prove enough to bring the case within the jurisdiction of the coun-

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ty court, but which turns out to be insufficient to prove each count. In such cases, if the court should be of opinion that the suit was brought in good faith, but the evidence different from what might reasonably have been expected, they ought not to dismiss the suit for want of jurisdiction. It is more like the case where the declaration counts on several distinct notes, some of which had no existence, and the counts were evidently inserted to give jurisdiction to the county court.

The amount to be recovered in this case was certain, and did not exceed seventy-five dollars, and we cannot say that the plaintiff might sue for that sum before the county court, by making counts for penalties which had never been incurred. We do not see that the plaintiff is laid under any inconvenience by this view of the law. He could have brought as many actions as he thought proper before a justice of the peace, and could have collected all the forfeitures to which the defendant was liable. If he ventured to bring his suit to the county court, he should be satisfied that his evidence would prove, or at least, would tend to prove, that the forfeitures exceeded the sum of one hundred dollars, to which extent a justice had jurisdiction. The decision of the county court, that they had jurisdiction, was therefore erroneous; and although they might not have been warranted in directing a verdict for the defendant, they should have dismissed the suit for want of jurisdiction. The judgment of the county court is therefore reversed, and the action is dismissed and the defendant will recover his cost.

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JOAB HOLLAND and IRA CUTTER vs. ORRA OSGOOD.

In case of the absence merely of a justice of the peace, before whom a writ is made returnable, any other justice of the peace present, who can judge between the parties in the case, may take jurisdiction of the cause for the purpose of determining the question of continuance.

This question he shall determine upon the sufficiency of the reason for the absence, but he is himself the sole judge of the question, and his adjudication is final.

The second proviso of the act giving this authority, which requires that the second justice shall "enter on the files the reasons" for the continuance, referring as it does to the expression in the body of the act, "by reason of sickness or other cause," would seem to have intended that the justice should enter the "*reason* of the absence," as far as they were known to him.

But in a case where they were not, and could not be certainly known to him, except from inference and presumption, he is not bound to state the presumption or inference in his record, but may state the absence generally and the inference being implied, it is the same as if it were expressed.

This part of the act being merely advisory to the justice as to the mode of keeping the record of the proceedings, if it be not strictly complied with, it does not avoid the proceedings.

Distinction between those provisions of a statute which affect the *validity* of proceedings, if disregarded, and those which do not.

A person, who under color of a license, takes property for another purpose, or who takes property after the license is recalled, is liable in trover. And it makes no difference that the plaintiff might have elected to hold it as a sale and delivery to a third person, instead of a conversion by the defendant.

This action being originally sued before a justice of the peace, on the return day of the writ the subscribing magistrate being absent, another magistrate continued the cause, under the statute of 1832. The continuance was entered upon the files in these words: "Townshend, January 29th, 1835. The signing magistrate being absent, I continue this cause till the 28th day of February next," &c., signed W. R. Shafter, Justice Peace. This was urged as a matter in abatement before the magistrate, and in the county court; but the plea being overruled, the question comes here for revision.

The cause then proceeded to trial before the jury.

The plaintiffs produced testimony tending to prove that they were owners of a brick-kiln in Townshend, and sold at their kiln 6000 bricks to one David Johnson of Fayetteville, who contracted with the defendant to draw said bricks for him, and directed the plaintiffs to deliver the same to him. The defendant drew, at different times to Johnson, 5500 of the bricks, and when he took the last of those, he suggested to Holland he should not wish to come

again for so few as 500—Holland told him he should insist on Johnson's taking his whole 6000, and defendant could come and get them when plaintiffs were not there; and directed what part of the kiln to take them from. When defendant arrived at Johnson's, he suggested the same to him, who told him he did not want the 500 to use. Defendant then repeated what Holland had said, aforesaid—whereupon Johnson told him if plaintiffs insisted on his taking the remaining 500, he must draw them. Soon after this, the plaintiff, Cutter, saw Johnson at Fayetteville, and they agreed Johnson need not take the remaining 500; but of this, it did not appear that defendant was informed.

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It further appeared, that defendant resided in Brookline, and he went to the kiln in the absence of the plaintiffs, and took 500 bricks: On his return he met with the plaintiff, Holland, who asked him from what part of the kiln he got the brick?—The defendant replied, from the part he directed: to which he replied, it was well. The defendant informed him how many he had, and Holland said he was satisfied—it was right. The defendant then informed Holland he must get to the Flats (meaning Fayetteville, where Johnson resided,) before noon, as the brick were wanted. He did not however go to Fayetteville, but took another road, and carried the brick to Brookline, and converted them to his own use; and he afterwards told Johnson he would pay him. It did not very distinctly appear whether defendant took those brick before or after Cutter and Johnson agreed to abandon so much of their contract.

The defendant requested the court to charge the jury, that if they believed a contract existed for the brick between plaintiffs and Johnson, and for the drawing between Johnson and defendant, the plaintiff taking the brick was not tortious, and the present action could not be sustained. The defendant also requested the court to charge that the acts and declarations of Holland, when he met the defendant, ought to be considered as a fair ground of inference that the taking of the bricks was not tortious, and if so, the plaintiffs were not entitled to recover.

The court declined so to charge, but did charge the jury, that if the jury found defendant was employed by Johnson to take and transport 6000 brick, and was directed by the plaintiffs to take the remaining 500, even in their absence, and what part of the kiln to take them from, the plaintiffs cannot maintain this action against the defendant for so taking for and carrying to Johnson, though Cutter had in the mean time abandoned the contract with Johnson

**WINDHAM,** unless the defendant had been informed thereof, or his authority  
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**Holland et al.** The defendant having been authorized by Johnson to take and  
vs. transport the brick to him, and by the plaintiffs to take said brick  
**Osgood.** for Johnson, even in their absence, and transport them to him, did not authorize him, without the consent either of plaintiffs or Johnson, to take brick for *himself* and carry them to Brookline. If the defendant did so, the jury will find for the plaintiffs.

As to the conversation with Holland when he saw defendant on the way with the brick, and when told by defendant he was going with them to the Flats, (where Johnson lived,) and made no objections, it might have arisen from supposing the brick were going to Johnson, or it might be owing to his having previously agreed with defendant to take the brick on his own account. If the former, it does not relieve the defendant—if the latter, it constitutes a good defence.

To this charge, the defendant excepted.

**R. M. Field for defendants.**—I. The first exception is to the decision overruling the plea in abatement.

The writ was returnable on the 29th January, 1835, before justice Howard. Justice Shafter continued till 25th February, and entered his reasons on the writ as follows: "Townshend, January 29, 1835. The signing magistrate *being absent*, I continue this cause to the 25th day of February next, at one o'clock of said day, and at the same place. W. R. Shafter, Jus. Peace."

The defendant, under his plea in abatement, contends that this was no good continuance under the act of 1832.—(See Acts of 1832, p. —.)

1. The act requires, in its second proviso, that the reasons should be entered on the files. If no reasons, or insufficient reasons are entered, the continuance goes for nothing.

2. The only reasons that will authorize a continuance are, "sickness or other cause rendering the magistrate *unable* to attend."

3. But the reason assigned by Shafter is, that Howard was *absent*, or in other words, did *not attend*.

II. The second exception arose on trial of the merits.

The case states in substance, that David Johnson bought 6000 bricks of the plaintiffs, and employed the defendant to draw them from the kiln.—The defendant drew them away, and converted 500 to his own use.

The defendant contends that this gave no right of action. The bricks, immediately upon being taken from the kiln by the defendant, the servant of Johnson, became the property of Johnson, and for a subsequent conversion he alone could sue.

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Such is the rule as to common carriers. For a subsequent conversion, the writ must be in the name of the consignee, and *not* in the name of the consignor.—See Chit. Cont. 151, *Dawes vs. Peck*. 8 T. R. 330, &c. &c. &c.

*John Roberts, contra.*

The opinion of the court was delivered by

REDFIELD, J.—The question of the sufficiency of the plea in abatement arises on the construction of the second proviso of the act of 1832, giving one magistrate authority to continue a cause returnable before another, in case of his absence, “by reason of sickness or other cause.” The proviso is, that the justice shall enter on the files “the reasons therefor,” at the time of such continuance. The terms used in the statute to define the occasion when the second magistrate shall have authority to assume jurisdiction of a cause not returnable before himself, imply clearly, on any rational construction, that he shall do it on finding the justice before whom the writ was made returnable *absent*. There must be some definite tangible point, which shall transfer the jurisdiction of the cause from one tribunal to another, and this can be nothing but simply the absence of the first magistrate. In that case, it is the duty of any other justice of the peace present, *to take cognizance of the cause*. It will not do to say that he must inquire into the reason of the absence before he takes jurisdiction of the cause, for this will involve the absurdity that he will be adjudicating a cause of which has never yet obtained or assumed jurisdiction. The right of *primary* jurisdiction is never made to depend upon the mere judgment or discretion of the tribunal, but always rests upon some definable criterion, equally apparent to all. In this case, it is most evidently “the absence of the justice before whom the writ is made returnable,” which gives any other justice present jurisdiction of the cause for the mere purpose of determining the question of continuance.

If the subscribing justice be absent, and another justice take cognizance of the cause for the purpose of determining the question of continuance, his judgment upon that question, like that of any other tribunal upon a question of continuance, is final and conclusive,

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and not subject to be reconsidered and reversed by any other tribunal. These questions always rest in the discretion of courts, and as such, are never grounds of error or subject to revision. It is made the duty of the justice in such case to inquire into the "reasons of the absence" of the first justice. What shall be a *sufficient reason* for the absence, to justify a continuance, is no where defined, except "sickness or other cause." By this of course is intended "other reasonable cause;" but the second magistrate, *after* taking jurisdiction of the cause, is to judge of the reasonableness of the cause; and he will of course determine this question in his own way, upon such testimony as he may see fit to require. He may consider stress of weather, sickness of one's family, absence on a journey sufficient or insufficient reasons for a continuance of the cause, but his determination is final. And we do not apprehend any great injustice is likely to arise from such a construction. If the justice be absent, it is presumable he is absent for some good reason, and should be so taken, unless the contrary is made to appear, or at least some suspicion of that character raised. It is not supposable that in every case the precise reason of the absence can be known. In case of absence on a journey, it will evidently be impossible to know more than that the first justice is absent on a journey, and this is nothing more than "absence" simply. Indeed absence is all that the magistrate can require in practice to be *proved*; and from this and the attending circumstances, he determines whether the absence is for reasonable cause, or in the words of the act, for *any cause*, or *without cause*. If the former, the cause should be continued—if the latter, it should not. If the cause is ordered to be continued, this shows that the second justice judged the absence of the subscribing justice was for cause, and his determination being final, it cannot be made the subject matter of a plea in abatement.

But, it is argued that as the second proviso requires the justice to enter those reasons of absence, the whole proceeding is void unless this is done. That proviso evidently was intended only to direct the mode of keeping the record of this anomalous proceeding. If the justice failed to comply with the requirements of a statute merely *directory* as to the *mode* of proceedings, or preserving his records, it was never held that the *proceedings* become *ipso facto* void. Statutes directing the mode of proceedings by public officers, have always been treated as *advisory*, and not intended to invalidate the vitality of the proceedings themselves, unless expressly so provided. And although the statute evidently intended that the



second magistrate should enter the *reasons* of the absence upon the files, yet it could not have been expected he could perform impossibilities. He could only be expected to be as definite in the statement of reasons as facts within his knowledge would warrant. In a case where no certain evidence of the *reasons* of absence could be had, and it was left to presumption, as above stated, it could not be very material that the second justice should *state* "he presumed the absence to be from some good cause;" for this would be fully *implied* in the fact of his continuing the cause for *the absence*. This then being a necessary implication from the words used, and the act done by the justice, it is in effect expressed or "entered upon the files."

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And in proceedings of this character, too much precision ought not to be required. The maxim, *qui hæret in altera hæret in cortice*, applies here with great force. For both reasons then we think the plea in abatement was well held to be insufficient. If the second justice had been "one who could not judge between the parties," or the first magistrate had been present, while another continued his cause, these things would have rendered the proceedings in the first case voidable by plea in abatement, and in the second case void as a discontinuance of the action.

The question raised in regard to the charge of the court is clearly with the plaintiff. The defendant having taken the brick after plaintiffs and Johnson had rescinded their contract, although this was not known to both plaintiffs, it could not in any sense be considered a delivery to Johnson. For, first, the defendant had ceased to be Johnson's servant—secondly, he took the brick on his own account, and put them to his own use; and, thirdly, the contract between plaintiffs and Johnson was at an end. This was clearly a conversion of the property by defendant, as charged. The attempt to show that the property in the brick vested in Johnson, at the time defendant separated them from the kiln and took possession of them, wholly fails. This is in no sense analogous to the case of goods delivered to a carrier by direction of the consignee, where it is held he must bring the action. Nor is it the case of the abuse of a license in fact. It is an attempt to refer an act to one motive which proved to have been done for another,—to use a license to cover an act, clearly not within the license, and this after a revocation of the license and a rescinding of the contract.—This is clearly not allowable, and in no sense can the defendant claim this favor for the mere purpose of defeating this action, when

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upon his own admission he is clearly liable to some one in trover for converting the property ; and it is quite immaterial to him, except so far as costs are concerned. If it were admitted that the plaintiffs might have elected to treat this as a sale and delivery to Johnson by his servant the defendant, they clearly were not bound to treat it so, and might pursue defendant as they have.

Judgment of county court affirmed.

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JAMES SWINTON vs. JOSEPH ERWIN.

The chairman of the board of auditors may give notice to the parties of the time and place of meeting, to adjust the accounts. If one of the parties does not appear, a majority of them may adjourn to any other time and place for the purpose of taking the accounts.

It is not necessary that the auditors should all convene, either for the purpose of giving notice, or of adjourning.

This was a case of exceptions to the report of auditors ; that two of the auditors, at the time and place notified by the chairman, met for the purpose of a hearing, and neither the defendant nor any other person for him, attended at the place appointed, either then or at any subsequent time, and one of the auditors not being able to attend, on account of ill health, the two auditors adjourned to the residence of the third, where the hearing was had.

*Mr. Bradley for defendant.*—The defendant contends that the two auditors had no power to adjourn to a place different from the one named in the notice.

For such right is not incidental at common law, nor within the terms of the power which is given to all three jointly. Nor could a jury, on a writ of inquiry, be adjourned until all had once met. —Cro. Car. 11, 27, 200—1 B. and P. 236—Style Prac. Reg. 65—1 Tidd 522.

And it is not given by the statute, which contemplates that defendant is to be notified, not of the time and place of meeting of two auditors out of three, but of "hearing and adjusting the accounts," and if no such hearing could be had, his appearance was dispensed with.—Stat. Chap. 10, § 1, p. 141.

*Mr. Kellogg for plaintiff.*—1. One auditor can notify the parties and appoint the time and place of hearing.

2. The party being notified, it was his duty to attend, and by neglecting to attend, was in fault, and cannot thereby subject the plaintiff to make a new notice.

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3. It does not appear that the defendant suffered any injury, but on the contrary did *not* sustain any.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—A decision conformable to the views of the defendant would be at variance with the practice which has uniformly prevailed, and is not to be made unless required by the obvious dictates of law. According to the principles which are settled in the action of account at common law, our statute requires the auditors to give the defendant notice of the time and place where the account is to be adjusted. It has been usual, when more than one auditor is appointed, for the one first named in the rule to act as chairman and give the necessary notices to the parties. This practice is recognized and sanctioned by the statute in addition to the statute relating to actions of account, passed November 1819, providing that the auditor or the chairman of the auditors appointed shall issue a citation, &c. It never has been considered as necessary, nor do we deem that it is required, that the auditors shall organize as a board and be sworn, before a citation of notice is given to the parties of the time and place of hearing. When the auditors have met they may adjourn from time to time. The parties, as in an action of account at common law, must appear *de die in diem*, till the account is finished; and if it cannot be finished by the day given, the auditors may give another day.—1 Com: Dig. Title Accompt, E. 8, p. 197. For the purpose of making an adjournment or giving a continuance, it cannot be necessary that all shall meet. If the parties are together with one or more of the auditors, at the time and place appointed, and a continuance is granted, the parties are of course notified of the time and place to which the hearing is adjourned, and have every opportunity, at the time of the adjourned hearing, which they had at the time first appointed, of rendering their respective accounts. If one of the parties does not appear and does not intend to, (and it is found in this case that the defendant did not intend to appear,) he receives no injury, because the auditors adjust the account of the other party, at a time and place convenient to them, to which they may adjourn, although it may be different from the place first appointed. Considering that the auditors have power to adjourn; that the chairman of the board of au-

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ditors may give the required notice in the absence of the other auditors, we very readily come to the conclusion, that, at the time and place appointed, a majority of the auditors, as was the present case, or even one of them may adjourn to another time and place, for the purpose of hearing ; and it is the duty of the parties, who were once duly notified, to take notice of the adjournment, and they are considered as having due notice of the time and place, when and where, the account is finally taken.

The judgment of the county court is therefore affirmed.

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ALVAN BOYDEN vs. TOWN OF BROOKLINE.

A town officer cannot recover pay for his services unless by express vote of the town, or *what is equivalent*.

*Dubitatur*, whether a constant usage in relation to that particular office, from year to year, will impose any obligation upon the town to pay such officer, where no express vote has been had to that effect.

The contemporaneous construction of a statute and long established practice under it, give an exposition of its spirit and intention, which courts are not at liberty to depart from.

The facts of the case are fully presented in the opinion of the court.

*R. M. Field for plaintiff.*

*D. Kellogg for defendant.*

The opinion of the court was delivered by

REDFIELD, J.—This is an action of assumpsit for work and labor, in which the plaintiff seeks to recover of defendant for services rendered as superintending committee of schools, for the years 1829, 1831, 1832 and 1833. Having shown his appointment and service the defendant introduced testimony tending to show, that, at the time of his appointment and service, it was understood between plaintiff and the town, that his services should be gratuitous. The plaintiff then offered to prove that the town had been accustomed to make compensation to other town officers, it being admitted they had never paid this committee for their services. The testimony was objected to by defendants and rejected.

The court charged the jury that the plaintiff could not recover, if there was any understanding such as had been attempted to be shown ; but if there was no such understanding that his services

should be gratuitous, he would be entitled to a verdict. The jury found for the defendant, and the case comes here on exceptions for our revision.

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No principle is better established than that one cannot recover for gratuitous services. This has been held, even when services have been rendered with the expectation of a legacy, or some other provision which had not been made. It is at variance with the very first principles of right and obligation, that a man shall be made the debtor of another against his will. This the jury must have found was the fact, or under the charge, their verdict would have been for the plaintiff.

And we are equally at a loss to see how the plaintiff could have been injured by the decision of the court below, in rejecting the testimony offered by him to show that the town had paid other officers, it being admitted they had never paid this committee. The town paying one class of officers, has no legal tendency to show that they intend to pay all their officers. It is common to pay listers in many towns for making the list, and no other officer for any service. And the testimony offered in connexion with the other facts in the case, that the defendant had not paid this committee, clearly had a tendency to raise a presumption against the plaintiff's claim.

But we are all satisfied that the court might have put the case on a much stronger ground against the plaintiff. It is very plain to us, that a town officer, as such, has no legal claim against the town to recover pay for services rendered, unless by an express vote of the town, or a uniform usage to pay that particular officer, from year to year, for his services. And in the latter case it would be very questionable whether a recovery at law could be had, if it had all along been left to the town to make such compensation as they should deem reasonable, after the services had been rendered. This is apparent from the statute making no provision for any compensation to town officers, except such as the town shall vote "*upon a particular statement of their time and services.*"—§ 7 of the stat. 1797.

This must of course be after the services rendered, and is by the terms of the statute made to depend upon the liberality of the town, as a gratuity.

The statute in providing the manner in which persons elected to town offices may excuse themselves from serving, seems to presuppose that the service will be without pay or compensation of any kind.

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One so situated may avoid the penalty of the statute, by "showing that he is unreasonably *oppressed*, or that others are unreasonably *exempted*."

A man could not, with propriety, be said to be oppressed by service for which he could sustain an action against the town on a *quantum meruit* and recover as much as he reasonably deserved.

It is believed such was the uniform contemporaneous construction of this statute, and that towns and town officers have, with few exceptions, acted upon this understanding of the law. Towns have sometimes made compensation to their officers for services, but it has never, it is believed, been done on the ground of legal obligation, but as a gratuity. In some instances towns have voted a compensation to listers and selectmen at the time of their appointment. This would no doubt give them a legal claim, but it could not be extended, by relation, to other officers. And this long established construction of the statute should now have the force of a judicial determination. Such has always been the deference paid by courts to such an exposition of statute or constitutional law.—*Rogers vs. Goodwin*, 2 Mass. R. 475—*Packard vs. Richardson et al.* 17 Mass. R. 144, Parker Ch. J.—*Stuart vs Laird*, 1 Cranch. 299—1 Peters. Con. 316.

No evil is known to exist under the present practice of towns in this respect, and it is at least questionable whether the doctrine contended for by plaintiff's counsel would tend to confirm the purity or faithfulness of town officers. It is to be feared it would more tend to increase the *amount* than to elevate the *character* of public service. And doubtless the number of aspirants for these petty places of public trust would so far be increased as to render our "March meetings" a scene of more commotion and confusion, than has ever been the case in this quiet state.

This same principle has always been recognized in this state, in regard to all officers. If no law of the state fixed their fees or pay, their services must be gratuitous. The state superintending school committee, while the office existed, served without pay, as one of our number has reason to remember.

The judgment of the county court is affirmed.

## WINDSOR COUNTY,

FEBRUARY TERM, 1836.

PRESENT, HON. STEPHEN ROYCE, }  
 " SAMUEL S. PHELPS, } *Assistant Justices.*  
 " JACOB COLLAMER, }  
 " ISAAC F. REDFIELD, }

WILLIAM LEWIS, Jr. vs. JEREMIAH AVERY and JAIRUS JOSSELYN.

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A mistake in the name of the town in which the jail is situate, in an execution, does not render that execution *void*, nor the imprisonment thereon, in the common jail of the county, a trespass.

If a person be committed to jail on a sufficient process, that is a defence to an action for a false imprisonment, though he at the same time be committed on an irregular or void process; unless it appears by the pleading or evidence that some inconvenience or injury has occurred to the plaintiff by this void process.

This was an action of assault and false imprisonment, alleging that the defendants took the plaintiff at Windsor, and transported him to Woodstock, in Windsor county, and there kept him confined and imprisoned for the space of 120 days.

The defendants pleaded severally, *not guilty*; and Josselyn gave notice in writing, that under this plea, he should give in evidence that he was a deputy sheriff of Windsor county, and received three certain executions in due form of law, in favor of said Avery against the plaintiff, issued by Richard Eastabrooks, jr., justice of the peace, and that by virtue thereof he took the plaintiff and committed him to the common jail in said county, &c.

Avery gave notice in writing that he, on a certain day, recovered three judgments against the plaintiff, before said justice Eastabrooks, describing them, and took out executions thereon in due form of law, and delivered to said Josselyn, who, by virtue thereof, committed the plaintiff, &c.

On the trial of this cause in the county court, the plaintiff gave evidence tending to prove the facts contained in his declaration. The defendants showed duly certified copies of the judgments, executions and officer's returns thereon, as mentioned in their notices,

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showing the plaintiff was committed to the common jail thereon, all at the same time. To some of these judgments and the records thereof were many exceptions, and to the executions which thereon issued. To one of them, no other objection appeared but this: In that part of the execution which directs the officer, for want of goods or estate, to take the body of the debtor, and him commit to the keeper of the jail, instead of the word *Woodstock*, in the county of Windsor, it was *Windsor*, in the county, &c. The county court rendered judgment for the defendants, and the plaintiff filed exceptions—whereupon, the cause passed to this court.

*Aikens for the plaintiff.*—The executions offered in evidence by the defendants, ought not to have been received in evidence; and if received, were insufficient to sustain the issue for the defendants, because,

1st, They contained no command to commit the plaintiff.

2d, They were not sustained by any legal judgments, and if either was defective, plaintiff should recover.—*Sherwin et al. vs. Bliss*, 4 Vt. R. 96—*Stillman et al. vs. Barney*, 4 Vt. R. 187—*Adkins vs. Breuer*, 3 Cow. R. 206.

*E. Hutchinson for defendants.*—Defendants have severed in their pleas, (one being the plaintiff in execution—the other the officer,) but it is presumed that the defence set up is good for both, if for either.

They justify the imprisonment under a certain writ of execution, (referred to and made part of the case,) and the Statute of Vermont, p. 209.

For the statutory form of writs of execution, see Stat. p. 316.

The execution in this case, though informal, yet, aside from the statute, was *not void*; and is, therefore, a protection to both officer and party, for all acts done under it, whilst in force, until regularly set aside.—6 Vt. R. 511, *Ex parte, Kellogg*—8 Mass. R. 86, *Albe vs. Ward*—5 John. R. 100, *Bissel vs. Kip*—1 Cow. R. 313, *Jones vs. Cooke*—1 Vesey Sen. 195, *Jeans vs. Wilkins*, (cited by Savage, Ch. J.)—1 Cow. R. 643, *Jackson vs. Cadwell*—10 Reports, 68, *Marshalsea* case, cited in.—3 Sel. N. P. 810, citing also as recognizing *Marshalsea* case—Cro. Car. 395, *Nichols vs. Walker*—Strange, 711, *Hill vs. Bateman*—do. 1002, *Shergold vs. Holloway*—2 Wills. 384, *Perkins vs. Proctor*—8 Term Rep. 424, *Brown vs. Crompton*—11 Mass. R. 89, *Young vs. Hosmer*.

Besides, it is questionable, whether the execution in question



was even *voidable*. The words, "in *Windsor*," in the execution, are evidently a mere clerical error, and may be stricken out, as surplusage, and the writ would then "contain not only the substance of a good execution," but would, in its phraseology, also, be a literal transcript of the statute, above cited, p. 209.—*Lessee of Matthews vs. Thompson et al.*, Ohio Cond. R. 569—*Brainard vs. Stilphin et al.*, 6 Vt. R. 14—*Herring vs. Selden*, 1 Vt. R. 17.

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The opinion of the court was delivered by

COLLAMER, J.—To one of these executions the only objection seems to be that the town of *Windsor* is inserted instead of *Woodstock*, as the place of imprisonment. This is obviously a mere clerical error, which every man must see, on inspection, and it would be extravagant to say that such a matter should render the precept absolutely *void*, and make all who were concerned in its issue and execution entire trespassers. The officer's duty on execution is all particularly pointed out *by statute*, and he therefore needs not a direction of particulars in the precept. By statute he is directed to commit the debtor to the *common jail* in the county, which he correctly did in this case. There was no common jail in *Windsor*, and that word may well be treated as surplusage.

It does not become necessary in this case to inquire in relation to the other execution. If the defendants had any legal authority for the imprisonment which the plaintiff shows they committed, it is enough, until the plaintiff shows some excess. The plaintiff has not showed he was ever taken or holden on the other execution alone for any moment, nor has he averred or shown that he was put to any inconvenience thereby, or to any cost or expense to be released from imprisonment thereon. It is therefore of no consequence whether the execution was good or not.

The plaintiff's counsel have very strenuously relied on *Adkins vs. Brewer* as sustaining a different doctrine. In that case, the officer had taken property on several good executions, and the same property on three *void* executions, issued by the defendants. He sold the property on all, and paid over the avails to the amount of \$162 to the defendants on these void executions. Here the excess of the officer's act beyond his good executions, was obvious, and how much injury the plaintiff had thereby sustained. The court sustained the action for this excess, for that which was done on the void process only. Ch. J. Savage says, "The sale by the officer after the other executions were satisfied, could not be just—

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hed except upon the authority of these executions; and as they were void, there was no authority, and the defendants were trespassers." This was only for the excess. In this case, the plaintiff having neither averred or shown any thing done him peculiarly and alone by virtue of the other execution, this execution furnished the defendants a legal justification.

Judgment affirmed.

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HYDE CLARK vs. WYLLIS LYMAN, Administrator.

*In Chancery.*

A person who has defended an action of ejectment, commenced against another, claiming the land as his, and where a recovery was had against the defendant, is not precluded from contesting the title of the plaintiff in the ejectment, in a suit in chancery, instituted by him against the same plaintiff.

The creditors of one of a firm, may set off on execution his share of the real estate, held by the firm, if it is not made to appear that the creditors of the firm will be injured thereby.

Such a levy will be held good, unless the creditors or the other members of the firm take some measures to have the interest of the debtor ascertained, before the levy is made.

A statement of the case will be found comprised in the opinion of the court.

The opinion of the court was delivered by

WILLIAMS, Chancellor.—The bill states, that in February, 1815, the complainant bargained with Elam Brooks for a farm, and completed the contract in March, by which he was to pay him the sum of 2120 dollars, to have possession of part in one year and part in two years: That in 1815 and 1816, he paid Brooks 1613 dollars of the purchase, and gave his notes for the residue, which he had paid to the administrator: That Brooks and his administrator have retained possession since, and have refused to execute and deliver him a deed. The bill further states, that Wells and Gross, who were creditors of Reuben Chapman, pretending that the complainant and the said Reuben Chapman were in partnership, which however he expressly denies; and also that Brooks had deeded the farm to the complainant and Chapman—took out an attachment against Chapman—recovered judgment, and levied their execution on one undivided moiety of the farm, as the property of Chapman:

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That they commenced an action of ejectment against Brooks, who was in possession, and at the May term of the county court in this county, the representatives of the survivor of Wells and Gross recovered a judgment in said action against the administrator of Brooks; and that this recovery was founded principally on the admissions of Brooks. The answer from the representatives of the different parties, puts the complainant on proof of his bill. It appears that the complainant defended the action of ejectment brought by Wells and Gross against Brooks, and gave a bond to Brooks to indemnify him from the cost of that action.

Several depositions and proofs have been exhibited in the case, and in the argument some questions of law have been raised and presented to the consideration of the court. The first question is as to the effect of the judgment rendered in the action of ejectment, and if this is so far conclusive upon the complainant, as the defendant contends, the case is at an end, and the bill must be dismissed. The effect of that judgment is undoubtedly to confirm in the representatives of Wells and Gross all the interest, whether legal or equitable, which Reuben Chapman had in the Brooks farm. So far, there is no doubt that it is conclusive on the complainant and every one else. The general rule upon this subject has been correctly stated, that no one is bound by a judgment to which he is not a party or privy. It is true also that courts will sometimes take notice of the real party. The case mentioned in Peake's Treatise on Evidence, is of this character. If a man brings an action of ejectment in the name of another as his lessee, he being in fact the real plaintiff, the verdict is evidence for or against him in an ejectment brought in the name of another plaintiff on his demise. As it is optional with a plaintiff to bring a suit or action, there is abundant reason why he should be concluded by the judgment; but the same reasons will not apply to a person who appears for and contends in the name or right of a defendant. In an action of ejectment, it may be important and material to prevent a change of possession, to defend an action instituted to recover the possession. But inasmuch as in such an action, evidence of the declarations or admissions of the party defendant are admissible in evidence, it ought not to be conclusive. And it may well be doubted whether a voucher who is summoned in to make a title in an action of ejectment, would be concluded by a verdict rendered on proof alone of the admissions of the party. We are not inclined, then, on this question, which may be susceptible of doubt, to turn this case and hold the complainant concluded by the judgment render-

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ed in that action. From the minutes of the judge who presided at the trial, it appears that the question in that case was principally whether Brooks had ever executed a deed of the land to Clark and Chapman, and that the verdict was rendered on evidence applicable to that case, and principally on evidence of the declarations and admissions of Brooks. We can discover no collusion between Brooks and the plaintiff in that action. There is nothing which should induce us to believe that the admissions were falsely made, with a view to the benefit of the creditors of Chapman.—As against Brooks, the evidence is now abundant to show that he executed a deed to that import; but as against this complainant, there is no evidence to that effect, inasmuch as the declarations of Brooks are not evidence against him, although from the nature of the purchase and from the declarations of the complainant that he and Chapman had purchased the farm, as testified by Tilden, we should incline to the belief that if any deed was executed, it was executed to the complainant and Chapman jointly. The question then will arise, whether the orator has established by proof such a claim as entitles him to relief. For this purpose he must prove that he purchased the land for himself alone, or that he paid his own money for it; for if the land was purchased by him and Chapman jointly, or for their joint benefit, and they were equally the equitable owners of the same, the complainant cannot disturb the creditors of Chapman who have legally appropriated to themselves his interest therein. It is to be remarked, that it appears from the evidence that the complainant and Chapman were partners in the purchase of timber; although this is positively asserted not to be true in the bill: and further it appears that this land was purchased for the timber while they were partners. It would be highly probable therefore, that the purchase should have been made for their joint benefit. A sale of the land itself, either to Brooks or some one else, was undoubtedly contemplated, and the charge made by Clark to Clark & Chapman of the amount of the purchase money paid to Brooks, shows that this was contemplated as a joint purchase, or a purchase for their mutual benefit. If this was contemplated, it is not inconsistent that the bargain should be made by Clark, or that he should have paid the money.

To prove the case, the complainant has introduced several depositions, to wit, the depositions of James Hodgman, Pascal P. Hodgman, and Darius King. The relation of all these witnesses is consistent with the position assumed by either party, viz., that the purchase was made by Clark for his own benefit, or the benefit of

Clark and Chapman, and tend as strongly to prove one as the other. But from the testimony of Chapman, we should rather infer that the purchase was made by the two jointly, and that the equitable interest was in both. From this proof it cannot be said, that the complainant has established the fact that he purchased the farm on his own account alone.

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The next inquiry will be, whether the purchase-money was paid by Clark so as to create a resulting trust in his favor, even if a deed was not taken to him alone. There is no doubt that he paid the money; but it is very far from being proved that it was paid out of his own funds. The fair inference from the testimony is, that it was paid out of their joint funds, and out of money furnished by Chapman to pay the debts of Clark & Chapman in Vermont and New-Hampshire. The orator has not made out a case entitling him to the relief prayed for on this ground.

Another question has been raised, that is, whether if the purchase was made for the benefit of the firm of Clark & Chapman, it had not become the sole property of Clark previous to the attachment laid thereon by Wells & Gross. There might have been such an agreement between them as would have vested the equitable title in Clark alone, and the testimony of Chapman tends to prove this; but it is altogether too unsatisfactory and uncertain to entitle the complainant to a decree. There is no satisfactory evidence of any such agreement, and the declarations of the complainant, of Chapman and Brooks, and every one in interest, has been uniform, that the farm was purchased by the complainant and Chapman. It has been further urged, that the debt of Wells & Gross was not a partnership debt, but against Chapman alone, and that he could only be entitled to the share of Chapman after the payment of the partnership debts. Without deciding how far the English rule on that subject can be enforced here, and how it is to be enforced where the partnership effects consists of personal property, which may be sold on execution at auction, real estate, which must be appraised, and evidence of debts which are not liable to an execution, it is sufficient to say that this bill is not framed to present that question: there are no facts by which we are to determine that Chapman's share or right in the partnership effects did not amount to more than the half or the Brooks farm. The complainant did not ask to have an account taken of the partnership effects before the levy; and he cannot stand by, see the lands set off on execution to satisfy the debt against Chapman, wait until the creditors had recovered judgment for the possession of Chap-

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man's interest in an action of ejectment, and at this period disturb the levy on that ground. The result is, that the bill must be dismissed, with cost to all the defendants except the administrator of Brooks, and without cost to him.

*Mr. Hubbard and Mr. Marsh for complainant.*

*Mr. T. Hutchinson for defendant.*

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ASAPH FLETCHER vs. SETH EDSON.

A promise by a principal to pay into the hands of his surety, for his indemnity, the amount for which the surety has become accountable, whenever the latter shall be called on for payment by the creditor, or shall have reason to doubt the ultimate ability of the principal to save him harmless, is a valid promise, on which an action may be sustained by the surety; and it is not a prerequisite to an action, founded on such a promise, that the surety should have paid the debt or any portion of it.

This was assumpsit in two counts: the first on a promissory note, dated July 5th, A. D. 1830, for \$1150, payable on demand; the other on the same note in connection with a written condition or contract entered upon the back of the note. The second count was as follows:

"And for that the said Edson on the fifth day of July, 1830, at said Woodstock, was justly indebted to one Barnard of Boston in the commonwealth of Massachusetts, in the sum of eleven hundred and fifty dollars, current money of this state, and the said Edson then and there requested plaintiff to sign and execute with him, the said Edson, a promissory note for the said sum, payable to the said Barnard, as security for him the said Edson. Whereupon said Edson and the said Fletcher did then and there execute and deliver to said Barnard their promissory note of that date for the said sum of eleven hundred and fifty dollars—wherein and whereby the said Edson and Fletcher promised said Barnard to pay him the said sum with interest in annual installments of one hundred and fifty dollars each, commencing on the sixteenth day of January 1831, and so on from year to year, till the whole of said sum of eleven hundred and fifty dollars, with the interest thereon, shall be paid.

"Whereupon, and as security and to indemnify plaintiff from all cost and damages which he might sustain in consequence of signing said note to the said Barnard, the said Edson by his certain

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note or agreement, in writing of that date, by him subscribed and delivered to plaintiff, promised plaintiff, in consideration of the promises, and for value received, to pay him the said sum of one thousand and fifty dollars on demand with interest, on condition that plaintiff shall not demand or sue for said sum of one thousand and fifty dollars, or any part thereof, unless he, the plaintiff, should be called on for the payment of the said promissory note, so executed to the said Barnard by said Edson and plaintiff, or unless the plaintiff should at any time have reasonable doubts, whether the said Edson would, or could save him, the plaintiff, harmless from all cost and damage on account of signing said promissory note with said Edson and payable to the said Barnard, as aforesaid. And plaintiff avers that, on the 18th day of January 1834, the said Edson became in failing circumstances and insolvent, and had all his property attached by bona fide creditors, whereby plaintiff entertained reasonable doubts, whether said Edson could and would indemnify him from cost and damages for signing the said promissory note, payable to the said Barnard, as aforesaid, whereof the said Edson then and there had due notice. And thereupon the plaintiff commenced this his present action against the said Edson, as lawfully he might do. The demand described in this present count is for the same sum and claim described in the first count in the plaintiff's declaration. Yet the said Edson, not regarding his promise and undertaking, in this last count set forth, hath never paid the plaintiff the said last mentioned sum, though thereto, on the said 18th day of January, and before the purchase of the plaintiff's writ, at Woodstock aforesaid, requested, but still neglects and refuses to pay the same."

Certain subsequent attaching creditors of the defendant having been permitted, in pursuance of the statute of A. D. 1831, to appear and defend the action, a trial was had upon the general issue pleaded and closed to the court.

The plaintiff read in evidence the note declared on, with the contract endorsed upon it, which were of the following tenor:

"Woodstock, July 5, 1830.

"On demand I promise to pay Asaph Fletcher eleven hundred and fifty dollars, for value received and interest.

(Signed)

SYLVESTER EDSON."

"Attest, FRANCIS T. PORTER."

On the back of which is the following, viz:

"The within note is given in consequence of Gen'l Asaph Fletcher's signing a note with Sylvester Edson to pay James

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“Barnard of Boston the sum of eleven hundred and fifty dollars, payable one hundred and fifty dollars per year, from the 16th day of February, A. D. 1830, and interest on what remains, and in like manner each year, until the whole of the eleven hundred and fifty dollars are all paid. The said Fletcher is not to demand or sue for the said sum of \$1150, or any part of it, unless he, the said Fletcher, is called on for payment of said note which he has so signed with said Edson, or unless the said Fletcher should have any reasonable doubts of the security of the said Edson, as to saving him, the said Fletcher, good and harmless, at any time and at all times.”

It was admitted that the defendant's property had been attached, as stated in the second count of the declaration. The court rendered judgment for the plaintiff to recover the amount of the note ; to which decision the creditors, in behalf of the defendant, excepted.

*E. Hutchinson for defendant.*—First count declares upon the writing in question, as upon a promissory note. The second count, as upon a special contract of indemnity, but contains no averment, nor was any proof offered of plaintiff's having been damnified, other than the writing itself, and that Edson had been attached before suit brought.

Defendants have been permitted by leave of court, as subsequent attaching creditors, to defend under the statute, and they contend that the court erred in permitting a recovery to the whole amount of the sum named in the writing, for the reason that it cannot be declared upon, (and consequently cannot be recovered upon) as a promissory note in which the sum mentioned in the note is the rule of damages, but only as a special contract, subject to a contingency, both as to there ever being a cause of action upon it, and also if a cause of action accrues according to the terms of the condition, as to the amount of damages. That this is the true doctrine, even as between the original parties, and peculiarly so where subsequent bona fide creditors are interested and made party of record.

If plaintiffs, upon such contracts, can recover the full amount, treating them as promissory notes in the assessment of damages, without proof of any thing paid by them, it will furnish an easy method for men in failing circumstances, to place beyond the reach of creditors, in trust for their own after use, all the tangible property they may possess, and totally defeat the object of the statute under which the creditors here defend.



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This is like all special contracts, for the breach of which action lies, but under which no more damages can be received than what are proved. And a bare liability to pay a note as surety for another, is in law no damage, until payment made, or a judgment recovered.—15 Mass. R. 488, *Merrill vs. Merrill*—5 Term Rep. 486, *Carlos vs. Fancourt*, in Error—1 Bur. R. 227, *Goss vs. Nelson*—do. 325, *Roberts vs. Peake*—Chit. on Bills, 54—4 Vesey, 371, *Ex parte Tootell*—2 Bos. & Pul. 413, *Hill vs. Halford*—Bul. N. P. 272—4 Maule & Sel. 25, *Hartley vs. Wilkins*—2 Comp. R. 205, *Leed et al. vs. Lancashire*, also note to do.—12 Pick. 199, *Lambert vs. Craig*.

Suppose Edson should again be with property, and Barnard should sue and collect the note of Edson, the principal, (as he may) after a judgment here for plaintiff, what remedy would there be to recover the money back of plaintiff? Would not this judgment be conclusive of the right?

*Marsh & Williams, and B. Swan, jr. for plaintiff.*—This is an action, as stated in the first count, on a promissory note, in common form.

The second count states the same note, and writing, that the note was given in consideration of a like note executed by the plaintiff and defendant for the proper debt of the defendant to one Barnard, and agreeing that the plaintiff is not to sue for or demand any payment of the note unless the plaintiff is called on for payment of the note given to Barnard, or unless the plaintiff should have reasonable doubts of the security of Edson, as saving the plaintiff harmless at any time and at all times. This count then states that the plaintiff had reasonable doubts whether Edson could save him harmless, for that he had failed in business before the suit was commenced, and his creditors had attached or were attaching his property.

The question is, whether the plaintiff can recover on this note or contract on the general issue plead and joined to this count.

In *Carlos vs. Fancourt*, (5 T. R. 482) Lord Kenyon is reported to have said, "The question is not here whether the plaintiff in error, who may have promised for a valuable consideration to pay the defendant a certain sum of money on an event which has since happened, is or is not bound to perform that promise: if this promise was made on a consideration, there is no doubt but that an action may be maintained on it, as on a special agreement; but the question now before the court is, whether or not the note set forth

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in the record can be declared on as a negotiable security under the statute 3 & 4 Q. Ann, c. 9.

"The note was for £10 out of his (defendant's) money, that should arise from his reversion, £43, when sold," payable to A. Fancourt, and endorsed to defendant in error.

The note declared on in the present case was given for a valuable consideration—that is, for plaintiff's having given his own note with the defendant for the same sum to one Barnard; and the note and consideration entered on the back of the note is declared on in the second count as an agreement.

We are aware of the cases where it is decided that a note containing an agreement on the back, entered into before signing, making it payable on condition or on any contingency, is not negotiable within the statute of Ann, and cannot be declared on as a promissory note.

As in the case above cited, so in *Leeds vs. Lane*, 2 Camp. R. 205—*Williamson et al. vs. Bennett & Mitchell*, 2 Camp. R. 417—4 Camp. R. 127, and many others. But these cases are all decided on the ground either that the notes were not promissory notes, but agreements, and void under the stamp acts, the stamp duty not having been paid, or being in the name of endorsees, they were not negotiable under the statute of Q. Ann.

But no case has been found where such note and agreement, made on a valuable consideration, and declared on in the name of the promisee as an agreement, have not been regarded as binding and the foundation of an action.

The case of *Cushing vs. Gore & Grafton*, (15 Mass. R. 69,) we think is an authority directly in point for the plaintiff. The plaintiff had been in the habit of endorsing notes for the defendant. On the failure of the defendant, the note in question was executed by them for a sum understood to be full as much and probably more than all the liabilities the plaintiff had incurred. The note was given for the express purpose of enabling the plaintiff to secure himself by attaching property during the failure. It seemed to be understood (of which, however, there was no evidence,) that the plaintiff would pay the notes which he had endorsed for the defendant; but they were not produced, nor had they been taken up, nor was the amount of them known when the note on which the suit was brought was taken. The same state of things continued when the suit was commenced. At the trial, however, the notes which had been endorsed having been by the plaintiff taken up in

the mean time, were found to amount to \$1747 18, and the plaintiff took a verdict for those notes to that amount.

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Other creditors, whose notes became due before those endorsed by the plaintiff, had attached the same property which had been previously attached by the plaintiff. The verdict was afterwards sustained by the court; and in giving the decision of the court, the chief justice remarks, "In the present state of the mercantile world, it would excite great surprize if we were to decide that a note, deliberately given to an endorsee for the purpose of enabling him to secure himself against the effects of the endorsement, would not answer the purpose for which it was intended. But if there were any doubt of the principle to the extent mentioned, we think that when an endorsee has either expressly or impliedly undertaken to pay the note by him endorsed, there can be no doubt but that the undertaking is a good and valuable consideration for a promissory note."

In the present case, the note taken by the plaintiff was for the precise sum for which he had made himself liable for the defendant. The principal difference in the two cases is, that *supposed* undertaking of the plaintiff, of which, however, there was no proof, and the fact that after the commencement of the suit in that case, the plaintiff paid, and at the trial produced the notes which he had endorsed.

In the present case, the plaintiff made himself absolutely liable, not by endorsing, but by signing the note with the defendant, and the entire failure of Edson renders it certain that he must pay the notes to Barnard, as they became due, and will then be without remedy if he fail in this action.

If plaintiff cannot recover the amount of his note now, yet if a new trial be granted, he can pay the notes to Barnard before trial, and then recover the whole.

The opinion of the court was delivered by

**ROYCE, J.**—As a mere promise to indemnify against an outstanding demand does not furnish a cause of action to the promisee, upon his simply becoming liable to a suit on such demand, and as it did not appear in this instance that the plaintiff had paid the debt or any part of it, his right of recovery might depend on the peculiar terms in which the present contract of indemnity was framed. The contract consists of the note for \$1150, payable on demand, controlled and qualified by the stipulation endorsed upon it. Taken together they amount to an undertaking to pay into the

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plaintiff's hands, for his security, the whole amount for which he stood responsible for the defendant, whenever he should be called on for payment by the creditor, or whenever he should have reason to doubt the defendant's ultimate responsibility to save him harmless. We discover no sufficient ground for doubting the validity of such a contract. The plaintiff had a right to prescribe the terms on which he would incur a responsibility for the defendant's debt; and his assuming that liability was a sufficient consideration for the defendant's engagement to him. Whatever he receives under this contract, he may be compelled to pay on the foreign demand. To the extent of his means thus acquired, he will have exchanged situations with the defendant—becoming, in effect, the principal, and the defendant a surety. And should the plaintiff be otherwise indemnified and discharged from the foreign debt, he must refund the fruits of this action. The record will at all times exhibit the nature of the claim now asserted by him, and the purpose for which it is sustained.

It is insisted that the rights of the defendant's other creditors should control the plaintiff's remedy under this agreement. But to allow this would be to expose the plaintiff to a heavy loss, by depriving him of that security without which he probably would not have made himself accountable: it would be to abrogate the most important part of his contract. The statute has enabled these creditors to urge every legal defence to the action—every defence of which the defendant, if disposed to contest the right of recovery, could avail himself, either for his own benefit, or that of his other creditors. This is the only privilege conferred by the statute, and with this the creditors must be satisfied.

Judgment of county court affirmed.

## EBENEZER SNOW vs. SETH CONANT.

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An endorsement of a negotiable note, directing payment to be made to the endorsee, in unqualified terms, is sufficient to transfer the legal property and right of action, though the words *value received* be omitted in the endorsement.

In such case it is no defence to the maker of the note that the endorsement was not founded on a valuable consideration. It is sufficient if the title of the endorsee be not infected with illegality or fraud.

If the maker of a negotiable note has become the endorsee of other notes against the payee, and by giving the requisite notice has acquired a right to plead the latter notes in offset to his own, he retains the same right when afterwards sued by an endorsee of his own note. And in such case, no objection to the defendant's title to the notes pleaded in offset can be successfully urged by the plaintiff, which would not have been avoidable to his endorser.

If an action on contract is commenced against A and B, but, in consequence of a return of *non est inventus* as to B, is entered and prosecuted against A only, he may plead in offset a demand due to himself alone.

A motion for judgment, notwithstanding a verdict for the other party, is necessarily founded on the record alone, and can never depend on any state of evidence which is not disclosed by the record.

Assumpsit upon a promissory note, executed by the defendant and one Thomas Conant, made payable to Gilbert Allen or order, and by him endorsed to the plaintiff. The writ issued against both signers of said note, but a return of *non est inventus* was made as to Thomas Conant, and the action was entered and prosecuted against the defendant only.

The defendant pleaded, first, the general issue, which was joined—second, an offset of two promissory notes executed by said Gilbert Allen, made payable to one Cornelius Harding or order, and by him endorsed to the defendant. The endorsement of these notes were alleged to have been made, and notice thereof given to Allen, at the respective dates of the notes, and long before the commencement of the present action. To these offsets the plaintiff pleaded that Allen did not assume and promise, as alleged by the declaration in offset, at any time before notice given by the plaintiff to the defendant and Thomas Conant, of the endorsement of their said note by Allen to the plaintiff. On this plea issue was also joined.

At the trial, all the notes aforesaid, with their endorsements, were read in evidence without objection; and it appeared that notice was in fact given to Allen of the endorsement and transfer of the notes pleaded in offset, before any notice to the defendant or Thomas Conant of the endorsement of their note by Allen to the

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plaintiff. The plaintiff offered evidence to prove, that the only consideration for the endorsement of said two notes by Harding to the defendant, was the promise of the latter to pay for said notes, provided he could succeed in effecting the offset now attempted.— This evidence was objected to and excluded by the court. After verdict for the defendant, the plaintiff moved for judgment in his favor *veredicto non obstante*; and the motion being overruled, the cause was brought here on exceptions to the decisions of the county court, rejecting the evidence thus offered on trial, and overruling the motion aforesaid.

*T. Hutchinson for the plaintiff.* Two questions are reserved in this case: First, whether the testimony offered by the plaintiff and rejected by the court, ought to have been admitted: Second, whether the court ought to have granted the motion of the plaintiff to set aside the verdict, &c. The said first question really resolves itself into this: whether our statute of offsets will allow a defendant to defeat the plaintiff while he prosecutes a just cause of action, by filing in offset a negotiable note in which he has no interest, but holds it in trust for the original payee. We contend, that the statute bears no such construction. The principal object of all statutes of offsets is, to prevent a man from being compelled to pay money to another, without first deducting what is due to him from that other person—a further, but minor object is obtained, in diminishing the number of actions.

See the sections allowing offsets, on pages 85th and 127th.— Both allow offsets only in cases where the plaintiff is indebted to the defendant. In this case, Gilbert Allen was not indebted to the defendant, Conant, but to Cornelius Harding, who had made Conant his agent to collect. Such is truly the case, if the testimony offered and rejected be true. An assignment of a note or the endorsement of a note, in legal parlance, means a transfer; and this transfer is to be evidenced by a writing signed by the payee, and properly drawn to show a transfer. The usual, unqualified transfer, is written thus: "For value received, pay the contents to A. B." This signed, is a transfer. What is written on these notes, filed in offset, is not *prima facie* a complete transfer. Nothing purports a payment by Conant to Harding. There is no "*For value received*" there. These endorsements give Conant no right to claim the money,—they are merely an authority for Allen to pay, if he should choose. Chitty on Bills says, on page 6th, "A bill of exchange may be so assigned as to vest in the assignee the

legal as well as the equitable interest therein, and entitle him to sue thereon in his own name." The term assignment, means the conveyance of the legal and equitable interest. It would seem to be a most palpable fraud upon Snow, the plaintiff, if the defendant, under the statute allowing him to file offsets of claims against Allen, shall be allowed to file those demands which have never become his property, and in which he had no interest.

If the facts are, as the plaintiff offered to prove them to be, Mr. Harding could, at any moment, revoke the authority of Conant, even to receive the pay of Allen.

To this point, as also that parol testimony was admissible to show Conant to be the mere agent of Harding, we cite 6 Mass R., *Baker vs. Prentiss*, opinion of court on pages 432-3-4, and Chitty on Bills, 86.—See, also 5 Wend. 600, and 1 Hall's R. *Talman vs. Gibson*, on page 312, where the court will not let a holder of a note recover to the injury of any *bona fide* owner of the same. They deem it a fraud upon the owner. The present plaintiff ought as much to be protected against the fraud of Conant in using Harding's property to defeat the plaintiff, as Harding ought if Conant was endeavoring to collect the note in fraud of his rights.

In 5 Mass. R. 543, *Wilson vs. Holmes*, action upon a note specially endorsed as follows: "Pay Thomas Wilson, Esq., or order, for our use—value received in account," the court say, were it not for the words *value received*, Wilson would have no property in the note, general or special, and he could not recover upon it in his own name. And the evidence that the plaintiff paid no consideration for the note, was admitted, and proved fatal to his recovery.

In the 3d of Mass. Rep. *Rice vs. Stearns et al.*, the court say, on page 227, "It is settled, that when a negotiable security is endorsed '*pay the contents to my use,*' or '*to the use of a third person,*' or '*carry this bill to the credit of a third person,*' such an endorsement is not an assignment of the security, but is only an authority to pay the money agreeably to the directions of the endorsement."

The statute about negotiable notes, on page 144, was never intended to authorize the maker of a note to perpetrate a fraud upon the *bona fide* endorsee, to authorize him to become a mere nominal endorsee of other notes, in which he had no interest, and file them in offset, to defeat the plaintiff.

The statute says, "The defendant may *plead an offset of all demands proper to be plead in offset.*" These notes, which the

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defendant never owned, are not proper to be plead in offset. He has no right to let his friendship for Harding lead him to perpetrate a fraud upon the plaintiff.

The statute goes on, "which the defendant may *have* against the original payee." That is, have as his own—not which Harding may *have*, and have handed over to the defendant for his, Harding's, use. The court will please to recollect that, not only is there no expression of any value received in the endorsements of these notes, but the case shows that there was no testimony in aid of said endorsements, or proving any consideration paid by Conant to Harding.

Now, add the testimony offered by the plaintiff and rejected by the court, and the plaintiff's case must be a hard one, if he cannot recover.

With regard to the second question, whether the plaintiff's motion to set aside the verdict and have a judgment rendered for the plaintiff notwithstanding the verdict, but little need be said. There is evidently no mutuality in the claims. The plaintiff's note, sued, is against Seth and Thomas Conant, and the writ filled against both; and the notes plead in offset purport to be assigned, if assigned at all, to Seth Conant only.

We refer to an authority upon this point: that is, 5 Vt. R. 204, *Leavenworth adm'r vs. Lapham & Co.*—also the same vol. page 111, *Mott vs. Mott*.

*Marsh & Williams for the defendant.*—The objection to the defendant's right to recover on the note described in his offset, was, that no consideration was paid by the defendant to Harding for the assignment, but a mere promise to pay for the notes in case they should be allowed in offset: but that they were endorsed and delivered by Harding to the defendant, was not questioned.

It is not easy to perceive what the maker of the note has to do with the consideration of the assignment. It is enough for him that the payee, by his order on the back of the note, and the delivering of it to the assignee, has directed him to pay the contents to such assignee. The property in the note passes by the assignment and delivery, whether any consideration was paid or not. The maker of the note cannot inquire into the motives of the payee in making such assignment.

It is every day's practice to assign notes to some third person in trust for the payee, and to maintain actions on such note and assignment in the name of the assignee, and no one till the happy



moment when this defence was conceived doubted the legality or propriety of such practice.

But if it were necessary to prove a consideration for the assignment, or the want of a consideration might be averred, yet the conditional promise by the defendant to pay, if he could avail himself of the assignment as proposed to be proved by the plaintiff, is of itself a sufficient consideration.

Can it be pretended that the transaction, as stated in the exceptions, does not make out a sufficient cause of action in favor of the defendant against Gilbert Allen? If so, the statute authorises him to set it off against the note in the hands of the plaintiff.

The plaintiff has also filed his motion in arrest of judgment on the pleas in offset, as being insufficient to entitle the defendant to a verdict, and moved the court to enter up judgment for the plaintiff, notwithstanding the verdict for the defendant.

The ground of this motion is not very obvious; but it is supposed to be the want of mutuality between the demand described in the declaration, that being a note given jointly by the defendant and Thomas Conant, and the notes described in the pleas in offset being assigned to the defendant alone.

The presumption of law is, especially taken in connection with the written notice, that the assignment was made to both the makers of the note, on which the plaintiff declares that the notes mentioned in the pleas were endorsed in blank and delivered to both the Conants; and when the defendant found that he alone was sued, he filled up the endorsement so as to meet this state of things.

Our statute has made one signer of a joint note liable to be sued alone when the other is out of the jurisdiction of the court, or to be proceeded against alone in an action declaring against two or more, if the sheriff returns a *non est inventus* as to the others.—The case then stands thus: The plaintiff has a promissory note, the collection of which he has a right to enforce against the defendant alone. The defendant has a demand which he has a right to set off against the plaintiff's demand. Why should he not declare upon it in offset as his own separate demand? And why, inasmuch as these notes were purchased for the express purpose of meeting the claim on the plaintiff's note, why might he not fill up the endorsement to himself so as to meet the claim on which he had, by the state of things, become separately liable on his joint note? There would seem to be a perfect mutuality, except that the defendant's demand is against Allen. The defendant owes the

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plaintiff the amount of the note declared on, and Allen owes the defendant the amount of the two notes mentioned in the pleas.— Suppose the defendant held notes against Allen, payable to himself alone—he is sued alone on a note given jointly by himself and another, can it be pretended, that in this situation, the demands are not mutual? and must he, under such circumstances, be deprived of his offset?

The question seems so obvious that we are led to fear that we have mistaken the ground of the motion. It comes too, from such high authority, that we are not at liberty to think there is nothing but pretence in the motion.

But the law does not require perfect mutuality of demand neither on the part of the plaintiff or the defendant.

The case of *Nunez Adm'r vs. Modiglioni*, and that of *Conner vs. Murphy*, (1 H. Black. 217 & 657,) are in point.

But we have no occasion to go to English authorities: Our statute (Comp. Laws, 85, sec. 92) seems, in terms, to have settled the question as to mutuality. It needs only to be demands between the plaintiff and defendant, in order to entitle the parties to offset, one against the other.

And the statute regulating actions by endorsees gives the same right where the defendant has a demand against the original payee.

The demands which may be set off are required only to be between the plaintiff and defendant, or between the original payee and the defendant, so far as mutuality is concerned.

The decisions of the court go all lengths to show that exact mutuality is not necessary.

In the case of *Meader vs. Leslie*, (2 Vt. R. 569,) it was decided that a demand against the plaintiff, in his separate capacity, might be set off against a demand against Meader and Eames—Meader having sued as surviving partner. The authority of this case will not be questioned, the opinion of the court having been pronounced by the gentleman who is now counsel for the plaintiff. Here there was no mutuality as to the demands in controversy, but mere mutuality of parties.

So in *Meader vs. Scott*, (4 Vt. R. 26,)—the defendant was permitted to offset his demands against a claim in favor of Meader and Eames in an action in favor of Meader as surviving partner, though the defendant's claims were partly against Meader & Eames and partly against Meader alone.

In *Brundridge vs. Whitcomb*, (1 D. Chip. R. 180,) in an ac-

tion on a jail bond, the principal defendant was permitted to offset his separate demand against the plaintiff's demand.

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It seems thus that mutuality neither as to the nature of the demands nor as to the parties is in all cases of set-off required.

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So a debt against a surviving partner, as such, may be set off against a demand in his favor, in his separate capacity.—*Slipper et al. vs. Stidstone*, 5 T. R. 493.

Same point is decided in *French vs. Andrade*, 6. T. R. 582.

The conclusion from all the authorities would seem to be, that wherever there is a mutuality of parties or mutuality of demands, and there is no equitable reason to the contrary, offsets will be allowed; and indeed where there is mutuality in neither of these respects, yet if equity between the parties requires it, from an equitable construction of the statutes, offsets will be permitted.

The opinion of the court was delivered by

ROYCE, J.—The object of the evidence offered was to impeach the defendant's title to the notes pleaded in offset, by showing a want of consideration for their endorsement by Harding. This line of defence to the declaration in offset, seems to be somewhat inconsistent with the plaintiff's plea, which impliedly admits the validity of the endorsements by Harding to the defendant, and appears to present merely the question of priority between the notice given by the plaintiff to the defendant and Thomas Conant, and that given by the defendant to Allen. But since the defendant's title as endorsee of Harding has been treated at the bar as properly involved in the case, it will be so considered.

The words *value received* are not essential to the validity of an endorsement, in order to pass the legal property and right of action to the endorsee, so long as no terms are employed which tend to negate or restrict his right, as by directing payment to be made to the endorser's use, or to the use of a third person. In this instance, there is the usual direction requiring payment to the defendant, without the addition of any terms going to limit or qualify his interest. The endorsements of themselves therefore establish a *prima facie* right in the defendant, not only as against Allen, but for the purpose of the offset claimed. Whatever right of defence Allen might still have, by showing illegality in the consideration of the endorsements, as proving them founded on a gaming, usurious, or other prohibited consideration, he could not defend himself on the ground of a mere want of valuable consideration for the endorsements, in the absence of illegality and fraud. It follows that

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the evidence offered on trial would have furnished no protection to Allen against a suit by the defendant as endorsee of the notes.

But it is insisted that a proper construction of our statutes for allowing offsets will render the evidence available to the plaintiff, though it might constitute no defence for Allen. And it must be admitted that the statutes should be extended to those claims only which the party may legally enforce in his own name, and apparently in his own right. Hence it has never been permitted, that a demand accruing to a person in any official or representative character should be set off against his own private debt, or *vice versa*. This has long been settled in reference to sheriffs, executors and administrators, and persons in like situations. It is not perceived, however, that the present case should be classed with those alluded to. There is nothing in the situation of the defendant, by which he can be said to be claiming in *auter droit*; and much less does any thing of this kind appear upon the face of his declaration, or in the evidence adduced to support it. And whether he is regarded as an absolute purchaser in his own right, according to the import of the endorsements, or as a purchaser with the privilege of rescinding the purchase in a certain event, the result, for the present purpose, must be the same. In either case he is invested with the apparent property in the notes, and the legal right of action upon them, to be asserted for his own benefit. The evidence proposed would therefore seem to be equally unavailing to the plaintiff as to Allen.

There is another view of the subject, which also appears to be decisive. It has already been shown that the defendant had acquired a right of action in his own name against Allen, which the latter had no means of defeating. And after the requisite notice, which the defendant gave, Allen had as little pretence for resisting the offset now sought; for it would be a strange construction of the statute which should enable him to avoid an offset of the notes in favor of the person who could successfully prosecute them in a distinct action. A declaration in offset is substantially an action peculiar in nothing but the form of proceeding. But if the right of claiming the offset existed against Allen, it must also exist against the plaintiff, when he comes forward to prosecute the defendant's note given to Allen, and to which the offset was applicable. No principle is discovered which would justify the offset in one case and forbid it in the other.

As the evidence offered would have been unavailing in its influence upon the case, it was properly rejected.

There is also a motion for judgment to be entered for the plaintiff, notwithstanding the verdict. This is founded on the alleged want of mutuality between the note sued and those pleaded in offset. The plaintiff declared against Thomas Conant as well as the defendant, and his writ issued against both; but Thomas became severed from the cause by a return of *non est inventus* as to him.

It appears by the case of *Mott vs. Mott*, (5 Vt. R. 111,) that had the notes been endorsed to the defendant and Thomas Conant, the defendant might have pleaded them in offset in the joint names of both. The court there say, "To give effect to this statute, we think that those persons may be considered defendants against whom the writ issued." And again—"Whether the defendant (in court) could also have plead in offset a sum due to him alone, is not a question now before us; and we only remark, that if he has this double advantage, it must arise from the peculiar situation of the case." It is evident that the court did not intend to conclude the present question. And treating the matter as undecided, I must regard the present offset as more directly within the statute than the one there permitted. The right of pleading in offset is given to the "*defendant*," and Seth Conant is the only defendant in court; as such, he comes within the words of the act. The decision in the case referred to, was the result of that enlarged and favorable construction, to which a highly beneficial statute is always entitled.

It may be further remarked, that a motion of this kind is necessarily founded on the record alone; as when, according to English practice, the *postea* is sent from *Nisi Prius* to the court in bank. It can never depend on any state of evidence which is not disclosed by the record. Here the record shows the general issue mutually pleaded, and a verdict that the defendant is not in arrear.—But whether this result was produced by a failure of the plaintiff to establish a right of recovery on the note sued, or by the allowance of the offsets, does not conclusively appear of record.

Judgment of county court affirmed.

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If A. conspire with B. an insolvent and irresponsible person, for the purpose of procuring property on the credit of B. for the common benefit of both, and to enable B. to gain credit, A. assists him to appear like a man of property, by which means B. succeeds in purchasing goods on credit which are shared between the two; in an action on the case against A., brought by a person thus defrauded of his property, B. is a competent witness in support of the action.

This was an action of trespass on the case. The declaration charged, in substance—That the defendant conspired with one Temple, (a person of little or no responsibility,) to procure property on the credit of Temple, for the common benefit of both.—That for that purpose the defendant furnished Temple with the means of appearing among strangers as a man of substance and fit to be trusted.—That Temple thus prepared applied to the plaintiff, who was ignorant of his true character and circumstances, and purchased certain goods on credit.—That the goods had never been paid for, but had been divided between Temple and the defendant.

A trial was had on the plea of *not guilty*, when the plaintiff called Temple as a witness, who was rejected by the court as incompetent to testify for the plaintiff, on the ground of interest. And after verdict and judgment for the defendant, the cause was removed to this court, on exceptions filed to the decision excluding the testimony of said witness.

*T. Hutchinson for plaintiff.*—This was an action for the defendant's fraud in procuring the property of the plaintiff, by means of his own money, and the agency of Jabez Temple Jr.; and the only question presented is, whether said Temple was a competent witness for the plaintiff, he being objected to on account of interest, the only interest shown being what is apparent in the declaration. That shows him to have an interest in the question but no interest in the suit, unless it be that remote, contingent interest, which never excludes a witness, but only affects his credit. Temple is liable to be sued for the same tort, but *non constat*, that he ever will be sued in any event whatever, and a recovery either way in this suit leaves him equally liable to a suit as now.—2, Aik. R. 195, *Sanderson vs. Caldwell*, and cases there cited.

But it is said, or may be said, that a recovery by the plaintiff, in this suit, and a satisfaction of the judgment would bar any action against Temple for the same cause. But *non constat*, that any such judgment would be satisfied.

It is no matter whether such interest in the question, or the witness being a *co-tortfeasor*, appears by the declaration or by the disclosure of the witness, or extraneous testimony. We consider the law well settled, that a co-trespasser may always be a witness for either party when he is not a defendant in the action. We cite, 2 Stark. Ev. 764.—2 Camp. R. 333, *Chapman vs. Graves* and note. Lord Kenyon once rejected such a witness, but Le Blanc long afterwards said that decision was never acted upon. And see *Evans vs. Eaton*, 7 Wheaton 356, on page 311 of Cond. R. vol. 5, where the court say it is perfectly clear, that a person having an interest only in the question, and not in the event of the suit, is a competent witness. And, in general, the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him.

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*Marsh and Williams for defendant.*—The only question is whether Temple's testimony was rightly rejected.

In other words, the question is whether a man can in this way, swear his own debt on his neighbor.

Suppose in the absence of Temple, out of the State, the suit had been instituted against defendant, as a secret partner of Temple in the transaction stated in the declaration, could Temple in his turn be called as a witness to establish the partnership?

From the face of the transaction, Temple alone was liable to the plaintiff. The facts which Temple was called upon to prove would constitute a partnership, and therefore, Temple throw his debt in part, or in whole, by his own testimony on the shoulders of another.

If not, can the plaintiff, with more propriety, avail himself of Temple's testimony, by declaring in an action on the case, in the nature of a deceit. Every secret partnership, if intended to be kept secret to the prejudice of creditors, is deceitful and fraudulent, and the secret partner might be charged, either as a partner or in an action on the case for the deceit.

The witness then has a direct interest in rendering the defendant liable for a debt, which he himself contracted, and for which without his testimony, he alone is liable.

In *New vs. Chidgley*, it is said, persons primarily liable are never permitted to charge others by their evidence, unless in cases where they stand indifferent.—Peak's Ev. 171.

So in an action on a policy of insurance, stating the loss by the barratry of the master he cannot be a witness to prove a deviation

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by consent of the owners unless released by the defendants.—  
*Thompson vs. Bird*.—1 Esp. cases 339, do. 20.—Peak's Ev. 166.

In *Birt vs. Wood*, a partner cannot be admitted to prove, that the goods were furnished on his separate account, if the partnership be proved.—*Young vs. Bairner*, 1 Esp. cases 103.

Admitting Temple to testify, would open a wide door for fraudulent practices; the creditor would have nothing to do but persuade his poor and dishonest debtor to swear, that his richer neighbor was his partner, or sent him to procure the goods in question by some unfair pretence, in order to secure his demand.

The opinion of the court was delivered by.

ROYCE, J.—It is an ancient and universally admitted principle that fraud will operate to annul a contract, at the election of the party defrauded. And though in practice it is more usual to seek a remedy founded on the fraud, than to treat the contract as vacated by it, yet in cases of gross imposition the latter course has been uniformly sanctioned. There is no occasion, however, to decide, whether the transaction stated in the present declaration would, or would not, entitle the plaintiff to disaffirm the sale to Temple. In either case the question relating to the competency of Temple as a witness must receive the same answer. If the plaintiff had a right to treat the sale as a nullity and if this action is regarded as a manifestation of his purpose so to treat it, then the defendant and Temple become mere tort-feasors, who have wrongfully possessed themselves of the plaintiff's property. Under such circumstances the rule is now generally acknowledged, that Temple would be a competent witness for the plaintiff or defendant. It is true that in England, where a recovery against one joint trespasser or wrong-doer is held to be a bar to an action against his fellow, even before satisfaction, this rule has been sometimes controverted, and is stated by their writers on evidence with some hesitation. But there is much less ground of opposition to it in this state, since we hold that such recovery is no protection to a participator in the tort, until by satisfaction it has been made productive to the party injured.—*Caldwell vs. Sanderson*, 2 Ala. 195. It is urged that as Temple had incurred a liability by contract for the whole stipulated price of the goods, he was of course interested to subject the defendant to a recovery in this action. The objection assumes that such recovery, followed by a satisfaction of the judgment, would extinguish the witness' liability by contract; which, upon the supposition we are now pursuing, would



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indeed be the legitimate result. In effect the proposition appears to be, that the witness was interested to exchange a sole liability by contract, for a joint and several liability with the defendant in the character of a wrong-doer. It is certain, however, that in the latter character his liability would be as extensive as before, and might be followed by consequences affecting a judgment and execution against him, to which as a debtor by contract he would not be exposed. *Fisher vs. The Jail Commissioners*, 3 Vt. R. 323. For aught the witness could do, this liability might be visited upon him with all its legal consequences. His testimony in this case would be evidence to subject himself in a similar action, whenever the plaintiff might choose to institute a suit. Nothing short of a judgment satisfied against the defendant could protect him. Now it is only a fixed and certain interest which renders a witness incompetent; whereas the interest of Temple would be manifestly uncertain and contingent, depending on the will of the plaintiff over whom he has no control. He would but assume the place of every co-trespasser, who is a competent witness for the party injured, not because he is destitute of all interest, but by reason of this uncertainty of interest.

But we are not required to consider that the plaintiff intended to dissolve the contract of sale, though he should have had a right to dissolve it. The present is not an action of trover for the goods, nor is the declaration inconsistent with the subsisting obligation of the contract. In this view of the case it is relieved of all difficulty; as it also is upon the supposition that the plaintiff was not entitled to avoid the sale. As fraud is said to be extrinsic and collateral to the contract or proceeding in which it is practiced, so an action of this kind founded on the deceit, and not brought in avoidance of the contract, is wholly a collateral remedy. The plaintiff may recover more or less, according to the extent of his injury from the fraud complained of, and still retain his remedies unimpaired on the contract itself. It follows that Temple was not legally interested in this collateral action against the defendant, since his own liability under the contract could not be affected by it. The case most analogous to the present is that of a false and fraudulent representation of another's property and circumstances, made to enable him to gain credit. And there it is held that the person whose solvency was misrepresented is a legal witness to prove the fraud.—2 Stark. Ev. 470, and cases there cited. The reason assigned is, that the witness cannot, in an action for the price of the goods avail himself of the verdict. Be-

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tween such a case and the present it is not perceived that any material distinction exists.

The fact that Temple was the chief agent in conducting the fraudulent transaction, though it should reflect strongly upon his credit, does not render him the less admissible as a witness; the doctrine being established that a party to a fraud is competent to prove it.

The judgment of the county court reversed, and new trial granted.

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### FLETCHER and RICE vs. JOSEPH CROOKER *et al.*

The liability of an officer, for having neglected to levy an execution, confers no interest in the judgment debt, nor any right to control or discharge it. Therefore the proof of such liability alone is not admissible in support of a plea alleging that the officer was interested in the demand.

Nor is it a ground for reversing a judgment of the county court on exceptions, that they rejected evidence offered to prove, in support of such plea, that the officer had procured a second judgment to be recovered against the debtor, and a new execution to be issued; since it does not necessarily result from this that he acquired any interest in the debt, or even made any disbursements.

Debt on jail bond. The only ground of defence brought to the notice of this court is stated in the following plea in bar:

And for further plea, by like leave of the court, defendants say, that they ought not to be charged with the said supposed debt, because they say that the said Crooker was never legally committed to jail as in plaintiff's declaration is alleged, in this, that the said alleged commitment was made by one Jairus Josselyn, as deputy sheriff, who at the time of said commitment, and of the date of rendering said judgment, was interested in the whole amount of said supposed judgment and execution, and had no authority by law to execute the same, and that said execution should have been directed to and executed by some indifferent officer of said county, and this they are ready to verify, wherefore they pray judgment whether they ought to be charged with the said debt, by virtue of the said supposed writing obligatory.

The plea was traversed, and issue joined therein.

At the trial the defendants offered to prove, in support of the plea aforesaid,—“that the commitment alleged in the plaintiff's declaration was made by one Jairus Josselyn, as deputy sheriff, and that said Josselyn, previously to the rendition of the judgment set forth, had become liable to the plaintiffs for this debt, by reason of

a neglect to levy an execution for the same ; and had procured the suit to be instituted in which the judgment was had, and the execution issued as set forth in the declaration, in the names of the plaintiffs, but for his own indemnity." The evidence being objected to as irrelevant was rejected by the court below ; and verdict and judgment having passed for the plaintiffs, the cause was brought here on exceptions to the decision excluding the evidence aforesaid.

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After argument by *E. Hutchinson* for the defendants, and by *O. P. Chandler* for the plaintiffs, the opinion of the court was delivered by

**ROYCE, J.**—The plea alleges an interest in the judgment and execution to their full amount ; which is equivalent to an allegation that Josselyn owned the judgment. Perhaps the defendants were not bound to prove an interest in him commensurate with this averment, but they were certainly required by the plea to show, that to a greater or less extent he had a legal interest in the demand. His liability to the creditors, for neglect on a previous execution, was altogether collateral to the debt, conferring no interest in it, nor any right to control or discharge it. He doubtless felt an interest that the judgment should be paid, or in some way satisfied or extinguished, by the debtor ; as in that event his own liability for neglect would cease. But if such a collateral interest could affect the legal capacity of the officer to act in the future collection of the debt, (which for one I am not prepared to admit,) still, it is not the interest which the plea alleges. That alleges an interest in the judgment itself, and not a mere liability incidental or collateral to it.

The defendants offered further to show, that Josselyn, for his own indemnity, procured a second judgment to be recovered in the creditors' names, and the execution to be issued under which he made the commitment. And it is urged, as a necessary intendment from this, that the second judgment was procured at his expense, and that he was consequently interested in it, at least to the amount of the last bill of costs. It is to be remembered, however, that these exceptions stand in the place of a writ of error. We have to judge of the evidence as it was offered, without the privilege of adding to, or detracting from it. There was no offer to prove any assignment of the demand to Josselyn, or any contract with the creditors, by which he bound himself to prosecute and collect it. And although it is to be understood that he was instrumental in instituting a fresh suit against the debtor, and ob-

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taining a second judgment, yet we are not required to suppose that he gained any lien upon the judgment by making disbursements, for no such fact was stated. The manner of his interference is left to conjecture. He might, indeed, have conducted the second suit at his own expence by licence of the creditors, but he might also have influenced the creditors by mere entreaty and persuasion, to pursue the debtor, instead of prosecuting him for neglect.

As the evidence offered had no certain tendency to establish any interest of Josselyn in the judgment or execution, it was properly rejected.  
Judgment of county court affirmed.

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### URIAH HAYES vs. WALTER MORSE.

An endorsement of part payment upon a written contract, when it is proposed to be used for the purpose of rebutting a presumption of payment of the balance, can have reference only to the time such part payment purports to have been made,

This was an action of assumpsit on promissory note, dated April 22d, 1819, for \$120, or four cows and calves, four years from the month of May following the date. On the back of the note was the following endorsement, signed by the parties :

"January 10, 1833—Received *two* cows on this note, supposed, at the time the note was out, as agreed by us both."

At the trial, the defendant gave testimony tending to show, that at the time of making the endorsement, the defendant contended he had paid the whole note at the time it fell due, while plaintiff contended he had only paid two cows. It was finally agreed that the endorsement, as far as the parties could think alike, should be made, and accordingly the endorsement was made.

The court were requested to instruct the jury that the testimony, if believed, was sufficient to take the case out of the statute of limitations, which was the issue joined. The court refused so to charge, and directed a verdict for the defendant. The case comes here for revision.

*Mr. Cushman for the plaintiff.*—1. The plaintiff, on the trial, contended that he had received two cows only, on two notes for six cows.

2. That he had, at the time, two notes against the defendant—one for \$60, or two cows and calves, and one for \$120, or four cows and calves.—Both said notes dated April 22d, 1819—one payable in three years—the other payable in four years.

The defendant contended that he had paid four cows and calves, and no more; and that that was all he owed the plaintiff.—The first two cows paid by defendant, were paid in 1822, as per the depositions, and the same were endorsed by said Hayes on the first note for \$60 or two cows and calves, which was then out, or payable. The other note not being then due.

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Again: The parties living one in Boston and the other in Pomfret, and not seeing each other for a course of years; but they met on the 10th of January, 1823, as per the endorsement on the note sued, and then made the agreement and liquidated the matter.—By which agreement and liquidation, plaintiff contends, that altho' the said note might be technically outlawed, yet, what is there recited, together with the other evidence in the case, shows the note and the statute of limitations does not attach.

The two notes were both made evidence in the case; but the judge, in his bill of exceptions, has mentioned but one.

The two first cows paid, were endorsed on the note then due; and the two last endorsed by agreement, on the \$120 note then due.

*Mr. E. Hutchinson for the defendant.*—The writing on the back of the note, signed by the parties, (relied upon by the plaintiff as taking the case out of the statute,) is no more nor less than an admission of just such facts as are therein stated. And the only fact stated is, that two cows were paid at the time the note fell due. How can it be said that, by that, defendant admitted a balance to be due, when he was neither asked to, nor did he say one word concerning the balance, whether it was due or not? Suppose, instead of this writing, defendant had been asked, in the presence of a witness, 'Did you not sign the note?' and that his reply had been, 'It is my signature,' that would have been an admission of an indebtedness *once*, but none of a subsisting indebtedness *then*. Suppose him to have been then interrogated, 'Did you not pay me two cows when the note was out?' and the answer had been, 'I did,' would any one at this day contend that that alone amounted to an acknowledgement of the rest being still due? Neither does this trick of the plaintiff, in procuring defendant's signature to that writing, (when by his own admissions defendant all the while contended that the note had been fully paid,) avail him any thing by way of *inference*. Indeed, the very phraseology of the writing, that "two cows were paid, supposed at the time the note was out, as agreed by us both," necessarily implies that they had a dispute

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about the rest. Else, why not take a new note? For the very obvious reason that he could not get it.

"It is not enough that the acknowledgement goes to the original justice of the claim; it must go to the fact that it is still due."—Ch. J. Marshall, in *Clementson vs. Williams*, 3 Cond. R. 37—8 Cranch, 72.

"The acknowledgement, to revive the original cause of action, must be unqualified and unconditional. It must shew *positively* that the debt is due in whole or in part."—Ch. J. Marshall, in *Netsell vs. Bussard*, 11 Wheaton, 309—6 Cond. R. 325—See also *Olcott vs. Scales*, 3 Vt. R. 173.

"The statute of limitations, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, should have received such supports from courts of justice, as would have made it what it was intended emphatically to be, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time; but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses."—Justice Story, in *Bell vs. Morrison et al.* 1 Pet. R. 360.

The opinion of the court was delivered by

**REDFIELD, J.**—It is not necessary, perhaps, to go into any discussion of the long vexed question, how far an endorsement of part payment on a note or bond is evidence to go to the jury for the purpose of rebutting the presumption of payment in the one case, or to remove the operation of the statute of limitations in the other. It was once settled in England, [(*Searle vs. Bossington*, 2 Strange, 226,) that an endorsement in the hand-writing of the obligee or payee, bearing date prior to the term of the period of the statute of limitations having elapsed, might go to the jury as evidence to rebut presumption of payment, or remove the statute bar. That case was very elaborately discussed at *nisi prius*, before Ch. J. Pratt, who rejected the evidence, subsequently, in the King's Bench and Exchequer Chamber, and finally in the House of Lords, in each of which courts it was held that the testimony was competent to go to the jury. That decision was acquiesced in until more recently, when Lord Ellenborough, at *nisi prius*, held that such an endorsement, to be evidence to go to the jury to rebut presumption of payment, or remove the bar of the statute of limitations, must be accompanied with other evidence tending to show, either

that the endorsement was made by the consent of the obligor or maker of the note or bill, or that it was in fact made before the right of action had become barred by lapse of time, and when the payee could have had no motive to make the endorsement with a view to use it as evidence for that purpose. This rule was adopted in New-York by the supreme court in the case of *Roseboom vs. Billington*, (7 John. R. 183.) And such continued to be the settled law in Westminster Hall until the passing of Lord Tenterden's Act, requiring the promise to pay a debt barred by lapse of time, in order to avail the plaintiff, to be in writing. This is the 9th Geo. IV. C. 14, and finally put all discussion of that and similar questions at rest. With us the subject is still open to discussion, and must remain one of some uncertainty until the legislature see fit to interfere. There is perhaps no subject upon which there has been more judicial legislation than that of the limitation of actions. The whole subject of removing the bar by a new promise to pay the debt, or an admission of its existence, is a creature of the creation of courts. The presumption of payment of a bond (in England) from the lapse of twenty years, is of the same character.

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But in regard to an endorsement on a written contract, it has always been held that to avail the payee for the purpose of rebutting a presumption of payment, it must be an endorsement of a payment made at the date of the endorsement, or that it can have reference only to the time at which the payment was in fact made. In this case, the endorsement being signed by both parties, no question as to its being made before or after the debt had become barred by statute, will arise. For being signed by the defendant, if it imported a payment at the time of its date, it must clearly take the case out of the statute. For part payment of the debt without qualification is an admission of the balance remaining due, which is sufficient to remove the bar of the statute of limitations.—*Olcott vs. Scales*, 3 Vt. R. 177. But this is only a payment made at the time the note fell due, and does not import a payment at the date of the endorsement. And this admission was accompanied with a claim that the whole had been paid. The endorsement then taken, either by itself or in connection with the other evidence, which is competent to qualify or explain a mere admission and not a contract, had no tendency to show an admission of a present subsisting debt, which defendant intended to recognize as a binding obligation, and therefore could not remove the bar created by the statute of limitations.—*Clementson vs. Williams*, 3 Cond. R. (Peters.) 37—8 Cranch, 72.

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And the construction contended for by plaintiff would be to revive the ancient absurdity of a constructive repeal of this highly beneficial statute, by declaring any assertion, which one might see fit to make, when interrogated as to the date, a sufficient admission to take the case out of the statute.

We are happy to believe that a more recent and more rational construction has redeemed these statutes from much of the uncertainty which for many years hung over them. They are now considered, like any other statute, worthy of the highest consideration, and binding upon courts within their just limits. They have been very justly denominated "statutes of repose."

Judgment of the county court is affirmed.

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LYMAN STEWARD vs. SOLOMAN DOWNER.

In a suit in the name of a common informer, to recover the penalty under the statute against usury, it must appear that the payment of money or other thing sought to be recovered was a voluntary payment and made in pursuance of a previous corrupt agreement.

A decree of the county court, in an action of ejectment predicated on mortgage, even after it becomes absolute and so the debt is paid, does not constitute such a payment as will enable the mortgagor or a common informer to recover the excess of lawful interest included in such decree.

By such decree it would seem, that the usury is purged, and no subsequent proceedings can be had, whereby the question of usury shall be again brought into discussion.

If the contracting party never had a right of recovery under that statute, no action can accrue to a common informer.

This is an action brought by a common informer to recover the penalty under the statute prohibiting usury.

The summary of the case was this:—One Benjamin Clapp obtained a loan of money of this defendant Downer upon usurious interest and mortgaged his farm in Barnard to secure the payment. On failure of payment Downer brought his action of ejectment for the farm, recovered judgment, and Clapp filed his motion to redeem. The sum due upon the contract was ascertained, and a time of redemption limited. That time expired without payment, leaving the title absolute in Downer. This farm was shown to be worth as much at least as all the amount of the decree, including interest and cost. After one year had expired without any suit by Clapp, and within a second year, this action was commenced by Steward. On trial the county court instructed the jury that the proof of these facts, if believed, did not entitle the plaintiff to re-



cover. The plaintiff excepted to this instruction and the cause passed to this court.

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*T. Hutchinson for plaintiff.*—1. That Downer received land in pay for his usurious loan can form no valid objection to the plaintiff's recovering; for the statute is so broad as necessarily to include all kinds of property, if received in satisfaction of an usurious loan. The statute, first, prohibits the receiving either in money, goods, or any other thing, and gives an action, within one year, to the person paying such money, or delivering such goods, or other thing. If the person paying does not sue within a year, and *bona fide* prosecute for the money so paid, or for the value of the goods or other things so delivered, any other person may sue for the same, within a second year. No argument can make this more plain. If any thing but money is delivered, its value is to be recovered.

2. We think, that Downer's recovering the land by judgment of court, forms no defence to this action. This merely shows a compulsory payment by Clapp; and the statute makes no exception in favor of compulsory payments, or payments after a judgment of court. The judgment for the land is no more conclusive against Clapp, than would have been his voluntary relinquishment of his equity of redemption in discharge of the debt; which he might have done by a quit-claim deed. Clapp may possibly have neglected to defend the action of ejectment through want of evidence to prove the usury. Or he may have colluded with Downer in covering up the usury by a judgment as well as in making the usurious contract. Indeed, that provision of the statute, under which any third person may sue during a second year, goes upon the supposition, that the person paying the usury either is unable to furnish the proof to defend a suit upon the usurious contract, or support an action to recover back the money paid, or else colludes with the person receiving the usury. The object of the statute is to protect the weak and the necessitous, against the powerful and avaricious. It places its guards upon all sides; first, forbidding the taking of excessive interest; second, making the usurious contract void. This would require proof in defence of an action upon the contract; third, allowing the person paying to recover back the usurious part; and, fourth, if the person paying lacks evidence to defend or support his rights, or should collude with the person receiving the usury, or should be deterred by him from seeking his remedy in either way, any other person may sue and recover.

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Here it will be observed, that no two of these remedies, are concurrent; but are successive of each other. The first remedy is, to prevent the payment of the money. But no suit lies to recover back the money or other property, till it is paid. It is the receiving the money or other thing, that makes the receiver liable. He is not obliged to receive it, if he is able to deter the debtor from his defence. If he does receive it, he does it at the risk of a suit to recover it back. Let it once be understood, that a judgment covers the usury so deep as never to be dug out, and that will be a cover for all usury. A judgment by confession will be as available as a judgment in a regular suit. This suit against Downer is brought for that which did not exist when he recovered judgment against Clapp. It was not, nor could it be, litigated in that suit. He is now charged with receiving the property, which he was then seeking to get.

We present the case upon a reasonable construction of the statute, finding no cases in point. And it does appear to us, either that the judgment in ejectment authorized the defendant to commit a breach of the law, which was not committed till the expiration of the time of redemption given to Clapp in the ejectment suit, or that he is liable in this suit for the breach of law, committed by him after the judgment. The mortgage was but a security for the debt, and the judgment upon it a conditional one, till the time of redemption expired.

The plaintiff cannot be affected by any neglect of Clapp. He is as a stranger to the judgment.—2 Stark. Ev. 586-7.

See 15 Mass. R., — vs. *Miller*, where money paid to satisfy a judgment was recovered back, said judgment still remaining unreversed.

*A. Aiken for defendant.*—1. The plaintiff is not entitled to recover. The "*other thing*," which the defendant is charged in the declaration with having corruptly and usuriously received of one Benjamin Clapp, is a *farm of land*.

He has been placed in the possession of that farm by the act and force of law, in execution of a regular judgment and decree of foreclosure.

This would be conclusive upon the original parties to the contract, upon which that judgment was had.—2 Caines 150.—Cowen's Just. 140.—*Thatcher et al. Executors vs. Gammon*, 12 Mass. R. 268.—*Bearer vs. Barstow*, 9 Mass. R. 48.—*Flinn vs. Sheldon*, 13 Mass. R. 452.

It is also conclusive upon a *Sharker* seeking his prey under the statute, (p. 163; s. 2)

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The law gives to this character a right of action, not on the ground of restoring to an injured party that which has been unlawfully taken from him, and so doing justice where injustice has been suffered, but for the purpose solely of punishment, to him who did the injustice. It is the infliction of a penalty; and the prosecution though civil in form, is criminal in substance and effect. The statute is, therefore, to be construed strictly.

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The popular right to prosecute is given by the statute, only upon the neglect to prosecute, or a covinous discontinuance of a prosecution by the party to the usury, who was injured by it.

Where there is no legal right of action to be neglected, there can be no neglect; consequently, the right of action, being extinguished, or never having accrued as to the original party, it is so as to all others.

2. The receipt, of satisfaction of a contract, upon a foreclosure, so far as it can be said to be a satisfaction, is by operation of law, and not by act of the parties.

The law can never punish a man for acting in abedience to its own decree.

The acceptance of the farm was in satisfaction of the judgment which was a title of record, made absolute by the judgment, not dependant for its constituent qualities, upon any agreement of the parties, but upon facts found upon the trial and purged of all unlawfulness, (if any had existed,) by the judgment itself. And it was not a "taking" or "receiving" of any thing upon the contract of the parties, for that was extinguished by the judgment.

The judgment gives the title, and not the deed. The effect of every final judgment, is to merge the cause of action.

The opinion of the court was delivered by

REDFIELD, J.—It is apparent from the terms of the statute, and such indeed, has long been the settled construction of similar statutes, that the payment, to constitute usury, must be in pursuance of a previous corrupt agreement. It is not necessary to inquire whether the payment must specifically correspond with the terms of the contract. It must be a voluntary payment and a payment made in consummation of the previous corrupt bargain.

In this case it is apparent the original contract was sufficiently corrupt and usurious; but it is equally evident that no voluntary payment on that contract has been made. The decree of fore-

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closure and possession of the mortgaged premises taken under it, no doubt operates as a payment of the entire debt if the premises be of sufficient value ; if of less value than the mortgage debt, then as payment *pro tanto*. But this is a payment by operation of law, and strictly *in invitum*. It is by virtue of a decree made on motion of the debtor. But as the county court have *pro hoc vice*, chancery powers, we see no good reason to make a distinction between this case and that of a decree in chancery.—*Strong vs. Strong*, 2 Aik. 373, and *Lovell vs. Leland*, 3 Vt. 581. There is no very obvious reason why any such distinction should be made.

And this presents another formidable objection to the plaintiff's recovery. This decree is to all intents a judgment, and as between the parties to the judgment, every defence to the original suit is forever put at rest. The validity of the judgment cannot be again examined. The usury is as effectually purged as if the parties had by agreement deducted the excess of interest from the security, which has always been held to purge the usury.

And if by the operation of the decree the party aggrieved is barred of any right to sue for and recover back the excess of interest, then no such right ever existed. Of course it could not have been delayed for "one year" as the statute seems to pre-suppose in the remedy given to a common informer. And the statute only gives the common informer the *same* remedy which the party paying the usury had had, which in the present case is none at all.

And should we permit this plaintiff to recover, it must involve the absurdity of re-examining the former decree, which can no more be done in this case than if the suit had been brought in the name of the original debtor.

In every view of the case the judgment of the court below was clearly correct, and is affirmed.

## SYLVANUS BRYANT vs. SYLVESTER EDSON.

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B, residing in New-Hampshire, sold to D, at Cambridge, Massachusetts, where D resided, a quantity of cattle, for which D there gave his promissory note, payable in fifteen days. B brought this note to Vermont, where E signed it. Held, that E was entitled to three days' grace on this note.

This was an action on a note of hand of the following tenor :

"\$1456 67.

Cambridge, Jan. 2d, 1834.

"For value received, we promise to pay Sylvanus Bryant, or order, fourteen hundred fifty-six dollars and 67 cents, in fifteen days from date.

(Signed)

REUBEN DAMAN,  
SYLVESTER EDSON."

The writ was prayed out against both signers, and bore date January 20th, 1834, and was served on Edson the morning of that day, and a *non est inventus* returned as to Daman.

On the trial, the defendant insisted he was entitled to three days' grace, which had not transpired at the commencement of the action. And he relied on the statutes of New-Hampshire, where the payee resided, and of Massachusetts, where the note was dated. The statute of Massachusetts, passed in 1825, was shown to be in these words :

"That all bills of exchange made after the first day of June next, and expressed to be payable at sight, or payable at a future day certain, within this Commonwealth ; and all promissory, negotiable notes, orders or drafts, made after the first day of June next, payable at a future day certain, within this Commonwealth, in which there is not express stipulation to the contrary, grace shall be allowed," &c.

The plaintiff proved that the note in question was executed by said Daman, at Cambridge, in Massachusetts, and there delivered to the plaintiff on a contract for beef cattle there sold by the plaintiff to said Daman.—That said note was brought by the plaintiff to Woodstock, Vermont, where said Edson resided, who there signed the same.

The defendant requested the court to charge the jury that the defendant was entitled to grace on said note, and therefore the plaintiff could not recover ; and upon the defendant's entering into a rule that a verdict should be entered for the plaintiff, and judgment rendered thereon by the supreme court, for the amount of said note and cost, if the supreme court should decide that the defendant was not entitled to grace, the court did instruct the jury that said Edson was entitled to grace ;—whereupon, verdict

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and judgment was entered for the defendant, and the plaintiff accepted.

*Argument for plaintiff.*—The defence all rests upon the question whether Edson was entitled to three days of grace.

1. We contend he was not so entitled. No place of payment is mentioned in the note. If a demand upon Edson to charge the endorser was necessary, it must be made at Woodstock.—See *Anthony's Nisi Prius*, p. 6, in note. And 30 days of grace are allowed in Vermont. Nor does it make any difference that Daman executed the note in Massachusetts. We may as well contend that Edson's executing the note in Vermont brings Daman under the force of the law of Vermont, as that Daman's executing the note in Massachusetts brings Edson under the force of the law of that state.

Nor does it make any difference that the note was given on the sale and for the purchase-money of cattle in Massachusetts. There are no days of grace upon that contract by the law of Massachusetts, or of any other state, till, by its being put into a note, it is brought within the law merchant.

2. Edson was not entitled to grace by reason of the plaintiff's living in New-Hampshire, where grace is allowed on notes. For though there are decisions showing that a note given elsewhere, but expressly made payable in New-Hampshire, shall be governed by the law of that state, yet I find no case in which it has been decided that the residence of the payee attached to it the law merchant of his state with regard to grace, when no place of payment is expressed in the note. I have been informed that the contrary of this was decided by this court on the circuit a year ago.

3. This case must be decided upon the law either of Vermont or Massachusetts, in neither of which is the law merchant of England exactly adopted. Judge Story, in his *Commentary*, on page 299, lays down a general rule with regard to the allowance of a time of payment beyond the day fixed in negotiable instruments. He says, "This period of indulgence is commonly called the days of grace; as to which, the rule is, that the usage of the place, on which a bill is drawn, and where payment of a bill or note is to be made, governs as to the number of the days of grace to be allowed thereon." In this rule he clearly refers to a case where the residence of the drawee is, the place where payment is to be made.

On page 298, he takes the rule from *Chitty on Bills*, 506-7-8: "By the common law the protest must be made where the bill is

payable. But the necessity of demand and protest must be governed by the law of the place where the contract is made." How far, then, are these rules applicable to the present case? This contract was made partly in Massachusetts and partly in Vermont. Edson may claim that a demand, if made at all, should be made on him here by the common law adopted here; but he has no claim for three days of grace by any law of this state.

But his counsel have argued, and will again perhaps, that he claims the benefit of the contract's being executed by Daman in Massachusetts.

Here we may well urge, that to take the case out of the laws of Vermont, and bring it within the laws of Massachusetts, it must be wholly executed in the latter state.

But passing over this for the present, what is the law of Massachusetts upon the subject of grace? Not the common law, but the law peculiar to that state. In *Jones vs. Fales*, 4 Mass. R. 245, the court state what the law of that state is. On page 251, Judge Parsons says, "By the law of this state, a note is not entitled to grace unless it is expressly made payable with grace." Such is the law there still, except in the particular cases mentioned in the statute of 1825, which the defendant produces. Those cases are these: *Bills of exchange, negotiable notes, orders and drafts, made after the first day of June then next, and expressly to be payable at sight, or at a future day certain within said Commonwealth.* On these the statute allows grace, unless there be a contrary stipulation. The place of payment, always material, is emphatically so in this statute. The place where payable is so important in a bill or note, that, when the same is expressed in the bill or note, and omitted in the declaration, it forms a fatal variance. It was so decided by the supreme court of the U. States.—See *Sebre et al. vs. Don*, 9 Wheat. 558—5 Cond. R. on p. 680.

The note in question was not expressly made payable in that state. There is no *expression* in the note about the place of payment. Whether the implication of law, or any understanding or agreement of the parties, not contained in the note, would fix the place of payment in Massachusetts, where one of the signers lived, or in New-Hampshire where the plaintiff lived, in either case the statute cannot affect the time of payment of the note; because that statute only embraces those bills of exchange, negotiable notes, &c. which are made in that state, and expressly made payable there. All other instruments, and all bills, &c. of any other description, are governed by the law as it stood before that statute

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passed; that is, there is no grace, unless it is secured by a stipulation in the instrument itself.

Creditors have their rights as well as debtors. The rights of creditors to have their pay according to the terms of their written contract, cannot be defeated by any custom, usage or law in the debtor's favor, unless he brings himself fully within that custom, usage or law.

We say nothing about a point made last year, in reference to the right to sue on the last of the days of grace, not because we think the case then cited, of *Lefley vs. Mills*, in 4 Term Rep. allowing a tender of payment at eight o'clock in the evening, is valid to overturn all other authorities on the subject; but because we find the service of the writ was made in the morning of the 20th day.

On the whole, we conclude it manifest, first, that the plaintiff's right of action was perfect, by the terms of the note, before his action was brought—secondly, that the defendant has established no such right to his three days of grace, as can defeat the plaintiff's right. As to him, the note was not executed in Massachusetts. As an intirety, the note was but *partially* executed in Massachusetts: If it were *wholly* executed there, it not being expressly payable there, nor expressly payable with grace, the defendant is entitled to no grace.

*Argument for defendant.*—The note is expressed to be paid in fifteen days *from* date, which in terms excludes the day of date from the fifteen; and if it were not so in terms, the law merchant would have the same effect upon the contract.

The note does not refer to any place of payment, and of course is payable where made, or to the plaintiff in New-Hampshire.—So that whether governed by the *lex loci* where made or where payable, it is the same thing.

In the case of *Grimshaw vs. Bender et al.* (6 Mass. R. 157,) where a bill of exchange was drawn by plaintiff, a merchant in Manchester, England, in his own favor or defendants', a house in Boston, and accepted by one of the defendants, to be paid in London, it was decided that the bill was a foreign bill of exchange, and subject to be paid according to the law merchant, as understood in Massachusetts; and because, from the terms of the contract, the plaintiff must seek his remedy in case the bill was dishonored in the country where the acceptors had their domicile.

There can be no doubt that Daman, the other signer of the note,



would be entitled to the usual days of grace; and it must be supposed that the signer, though he signed at a different place and time, merely as a warrantor for the payment by Daman, and having thereby subjected himself to all the liabilities of Daman, is also entitled to all the indulgencies which he could claim.

Again: It cannot be admitted that where there are two signers of a note, that one is liable to be sued sooner than the other, or liable to a different rule of damages.—Edson places himself in the shoes of Daman, and thereby subjects himself to all his liabilities, and acquires a right to all his privilege arising from the transaction.

Were it otherwise, and both had been sued under the same jurisdiction, plaintiff might recover against one, but could not against the other; that is, if both had been sued here, Daman would have been entitled to days of grace, and so the note as to him would have been sued before it was due; and as to him, therefore, no recovery would be had: but Edson, not being entitled to grace, plaintiff might have had judgment against him, and this on a joint note; and if both had been within the jurisdiction of the court, plaintiff must have sued both; for the action would not lie against one, and yet plaintiff could recover against one only.

This case furnishes an illustration of the foregoing remarks. The declaration counts against both Daman and Edson, and Edson is made separately liable, if at all, under the statute; because there is a *non est inventus* returned against Daman.

The law supposes that every contract is made at some place, and is to be performed at some place. This must necessarily be so; because all contracts must be expounded by the laws of some place.

When the contract does not in terms specify the place of performance, the court attempts to ascertain from the instrument itself the intent of the parties as to the place of performance.

The *lex loci* where the contract is made, must generally be the rule by which the contract is to be construed. But where the parties made the contract in one place, with a view to the performance of it in another place, the *lex loci* of the latter place must, in most respects, govern the court in enforcing it.—Where, by the laws of a state in which a contract is made, though it be negociable, may be discharged by payment to the payee after it is endorsed, it cannot be enforced by the endorsee.—4 Cow. 511, m.—*Hull vs. Blake*, 13 Mass. 155–6–7.

So the interest or damages are to be governed by the *lex loci contractus*.—S. C. 17 John. 511—12 Mass. 4.

We do not find many decisions reported in this state.

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The case of *Ripley vs. Greenleaf* (2 Vt. R. 127-33) is either reported wrong, or the decision was wrong. It does not appear where the note was made, or where payable. But the decision is, that as the maker resided in the state of New-York, and payment was there demanded, where the days of grace are allowed, it is therefore correct to adopt the same rule here in a case where the demand was made in that state.

It is insisted on the part of the defendant, that the maker of a promissory note, and probably the endorser also, is entitled to the whole of the day on which it falls due, to raise and pay the money, and cannot be sued till that day has expired.

But it is sufficient for us in this case, if the maker is entitled to the whole day.

We are fully aware of those cases in which it is decided that the drawer of a foreign bill of exchange is liable in case of non-acceptance before the bill comes to maturity. This is according to the law merchant, because it was purchased on the condition that the bill shall be accepted when presented, as well as paid when due.—3 East. 481.

But it is otherwise with inland bills of exchange, and we contend also as to the promissory notes, especially as between the maker and the payee.—Swift's Ev. 320.

Inland bills of exchange may be presented on the last day of payment, and protested, and notice given the next, which will be sufficient to hold the drawer; and we think the same due time applies to promissory notes.

The endorser of a *foreign bill* of exchange, places himself in the situation of the drawer,—every endorsement being regarded as a new bill drawn by the endorser.—3 East. 481.

But the acceptor of an inland bill of exchange has the whole of the third day of grace, and cannot be sued till the next day.—4 T. R. 170.

In *Leftley vs. Mills*, it was decided that the acceptor of an inland bill of exchange had the entire day of the last day of grace to pay the money in, and that a tender made at eight o'clock in the evening was good, and would exonerate the acceptor from cost.

The case of *Jones vs. Fales* (4 Mass. 245-51) was an action by the endorsee against the endorser. Notice was given on the last day of grace: the notes being payable with grace. Parsons, who gave the opinion of the court, is made to say, "Consequently the note is not due till the expiration of the time of grace, which is three days. I must therefore infer that the endorser is not holden

upon his endorsement of the notes without his assent, because the condition on which he agreed to pay was not performed."

That the endorsee did not allow the maker the whole three days of grace, before he gave notice to the endorser of non-payment.

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In *Morgan vs. Cuyler*, (8 Cow. R. 203,) the three days of grace are allowable between the maker and the holder of a promissory note, and when the notes were declared on in one court, on one of which the three days of grace had not expired when the suit had commenced, defendant was allowed to show this on the trial of the general issue, and plaintiff could not recover on that note.

The case of *Stanton et al. vs. Blossom et al.* (14 Mass. 116) is supposed to be relied on by the plaintiff. This was an action in favor of the assignees of the drawees against the drawers of a bill of exchange, for non-acceptance of the bill; and the case turned entirely on the question of notice of the non-acceptance.—The drawees refused to accept because they had been served with a *trustee process*. The payee of the bill supposing, probably, that this was evidence of there being no funds in the hands of the drawees, gave no notice to the drawers before suit. But the drawees had written to the drawers that they had refused acceptance, and assigning the reason. It was decided that defendants were entitled to notice, and that the letter written by the drawees was not sufficient.

The *New-England Bank vs. Lewis et al.* (2 Pick. 125) also relied on by the defendant, was an action by the endorsee against the endorser of a promissory note. The writ was served on the day when the note became due, and before notice was given to the endorser, which was however given on the same day by a notary public; and decided the action was prematurely brought. The case turned entirely on the question of notice, and nothing is said whether the endorser would have been liable to be sued on the same day had notice been previously given.

The case of *Shedd vs. Brett* (1 Pick. 401) is also an action by the endorsee of a promissory note against the endorser. It is in that case decided, that on the refusal of the promisor on the day of payment, notice may be given on the same day.—The writ was dated the same day, but served the next day, in North-Bridgewater, after the arrival of the mail. The case turned entirely upon the question of notice, whether it can be issued on the day of payment after the refusal to pay by the maker, and whether putting notice into the post-office was sufficient; and it was decided that the notice was regular. But it is not said that the writ might have

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been served the same day, nor that a suit commenced against the maker on that day could have been sustained.

The present is an action directly between the original parties to the note; and no case is found, where in such case, an action has been commenced and sustained on the day on which the note fell due. And the case stands on the same principle as a suit on any other note payable in cash.

If, therefore, the court is prepared to decide, that in no case the maker of a cash note is entitled to the entire day of payment, to make out and pay the money before becoming liable to a suit, the decision will be against us.

This, however, we think will be introducing law new in our courts, and certainly new to the profession in this state. And we appeal to the court with confidence, to say whether the law has not been universally construed and practised upon in this state, as it is now contended for by the defendant.

Should it be said, that in order to aid the plaintiff, (if indeed it would aid him,) the court must intend that the writ was sued in some of the last hours of the day, it is answered, that the court can intend nothing which, if true, the plaintiff might easily have stated and proved at the trial, in order to support a verdict; but here the verdict was for the defendant, and if any presumption can arise, it will be, that it was proved at the trial, that the writ was served in the early part of the day, and so the case seems to understand it; for the question is placed on the mere question whether the defendant is, in this case, entitled to days of grace, under the circumstances proved at the trial, and states in the case in which no question is made or reserved as to the part of the day in which the writ was served.

The opinion of the court was delivered by

COLLAMER, J.—The *obligation* of a contract—the *duties* it implies, and the manner in which it is to be *performed*, are fully acknowledged to be regulated by the *lex loci contractus*; while the manner of enforcing the remedy, in case of breach, constitutes no part of the contract, and is regulated by the *lex loci fori*. This is a distinction apparently clear, but frequently difficult of practical application.

That days of grace are a part of the contract—a part of its obligations and privileges, and therefore to be regulated by the *lex loci contractus*, has been decided, and does not seem to be now much controverted.—Story on Conflict of Laws, 299.

This is regulated by the law of the place where the instrument is *payable*. In this case, the contract was made in Massachusetts, and there the consideration passed; but the payee belonged to New-Hampshire. It has sometimes been suggested that this varies the case; but the law makes no distinction on that account.—“Every contract, whether made between foreigners, or between foreigners and citizens, is deemed to be governed by the law of the place where it is made and is to be executed.”—Story C. L. 233.

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After this contract was made in Massachusetts, it was brought to Vermont, and here the defendant, Edson, underwrote it.—Where, under these circumstances, is it to be considered as having been made? It was made in Massachusetts;—there the consideration passed—there it bears date—there it was delivered to the plaintiff, and it was afterwards signed by Edson here. There cannot be different obligations on the two signers; and as the place of date was not colorable,‡ this defendant executed the contract with reference to the law of the place where the transaction actually took place, and where the note bore date. Suppose a note was actually made in New-York, for money there had, and afterwards that note were underwritten by a surety here: Most unquestionably either of those signers would be subject to the payment of seven per cent. interest. This then must be considered a contract made in Massachusetts.

But, as already shown, the days of grace are regulated generally by the place of *payment*. This note has in it *expressly* no place of payment. It is a promise to pay, generally. By what law are such contracts governed? Where are they considered payable? It has already been shown the residence of the parties does not govern it.

“A contract to pay generally is governed by the law of the place where it is made; for the debt is payable there as well as in any other place. To bring a contract within the general rule of the *lex loci*, it is not necessary that it should be payable exclusively in the place of its origin. If payable every where, then it is governed by the law of the place where it is made; for the plain reason that it cannot be said to have the law of any other place in contemplation to govern its validity, obligation or interpretation. All debts between the original parties are payable every where, unless some special provision to the contrary is made; and therefore the rule is, that debts have no *situs*. The holder takes the

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contract as it was originally made, and as in the place where it was made."—Story C. L. 264.

This note must then be governed by the law of Massachusetts, where it was made. And this brings us to the single question, is grace allowed on such a note by the law of Massachusetts?

It is insisted by the plaintiff's counsel, that in order to have grace, the note must, upon its face, *expressly* be payable in Massachusetts. This argument arises wholly from a mistaken reading of the Massachusetts statute, in the argument for the plaintiff.—The plaintiff's counsel quote the statute as if bills, notes, drafts, &c. were all put on the same footing; but this is not so. The first clause of the statute, and in which alone the word *expressed* is used, relates exclusively to *bills of exchange*. The latter clause of the statute relating to negotiable notes, orders or drafts, gives grace on all payable on a future day certain, within the state. This includes all, whether *expressly* or *exclusively* payable there, or by being actually made there and payable on time, generally, are by the general law payable where made, as already shown; and so includes this note. We have been favored with no decision by the courts in Massachusetts on this statute; but we entertain no doubt such is its practical construction, and that grace is there constantly allowed on such notes.

Judgment affirmed.

*T. Hutchinson for plaintiff.*

*Marsh & Williams for defendant.*

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#### DEXTER PIERCE vs. SAMUEL CHIPMAN.

Where personal property, when sold is in the possession of a third person, and that person is fully informed, both by the vendor and vendee of the property being sold, this is a sufficient change of possession to protect it from the creditors of the vendor.

This was an action of trespass, for taking a certain heifer, brought by appeal to the county court.—Plea, the general issue, to the court.

On the trial the following facts appeared. Artemas M. Pierce was the owner of this heifer. On the first of January 1835, he put her to one Aldrich, to be kept and fed out the winter and until grass. On the first day of April, he and the plaintiff conferred on a purchase of the heifer, and on the eleventh the contract was

concluded, and the plaintiff gave his note for twelve dollars for her. The said Artemas wrote and sent by his son to Aldrich the following note.

"Mr. Aldrich, I have sold my heifer to Dexter Pierce. I will however pay you for wintering her out, as that is our bargain.

Respectfully yours,

A. M. PIERCE."

Which was delivered to Aldrich by the boy, and the plaintiff called on Aldrich and went with him to the barn to look at the heifer saying, he had bought her. Eight days after this, the defendant, a deputy sheriff, called at Aldrich's, with a writ of attachment against said Artemas M. Pierce and took away said heifer thereon. In the course of the trial the defendant offered in evidence, a copy of said writ, which was objected to by the plaintiff on the ground that the same was not admissible on the general issue; but the same was admitted. The court decided, that there was a sufficient change of possession, of said heifer, and rendered judgment for the plaintiff. To which the defendant excepted.

*T. Hutchinson for defendant.*—1. The defendant contends, that no special plea or notice was necessary, in order to entitle the defendant to prove his process. He was not guilty of a trespass in taking the property of the debtor, Artemas M. Pierce, and surely not, if the taking was from the actual or constructive possession of said debtor in said writ. There could be no trespass upon the plaintiff, unless the taking was from his possession.

2. The heifer was the property of said Artemas, and liable to the attachments of his creditors. The possession was in no sense changed, after the pretended sale to the plaintiff. The heifer was in the keeping of Aldrich for said Artemas, from January to April, under a contract between them for her to be wintered out, at the expense of said Artemas.

The plaintiff went to Aldrich, delivered the letter dated March 10th, went to the barn, saw the heifer, said he had bought her; and nothing more was done till the attachment by the defendant.

Thus we contend, that there was no such delivery as to render the sale complete as against creditors, and there was no agreement, nor even a request for Aldrich to become the keeper of the heifer for the plaintiff. He was keeping her for said Artemas when she was taken by the defendant, on said writ. All this amounted to no more than a contract of sale, and the delivery to be made when the heifer was wintered out.—1 Aik. R. 116, *Durkee vs. Mahony*.—Do. 158, *Boardman vs. Keeler et al.*—Do. 162, *Mott*

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vs. *McNeal*.—2 Vt. R. 555, *Spalding vs. Austin*. Hall expressly agreed to keep the chaise for the new owner. So in same vol., p. 374, *Barney vs. Brown*.

*Closson for the plaintiff*.—The only question is, was there a sufficient delivery to pass the property to the plaintiff? We would not contend against the principle, that to make a sale valid as against creditors, there must be a change of possession, which of course implies that vendor was in possession at the time of sale.

It is necessary to keep in view the reason upon which a train of decisions is had, and occasionally to revert back to first principles, lest we depart from those reasons. These reasons were, that as possession was the best evidence of ownership of personal property, it would be a fraud upon the public, for a man to retain the possession and exercise all the usual acts of ownership after sale. It might enable him to get a false credit, perhaps upon the strength of the very chattel itself. Hence the rule and the reason of it. Such possession in some of the states is only presumptive evidence of fraud, while in ours it is a circumstance *per se* of fraud.

In all cases which have been declared void by this court for want of change of possession, there continued some kind of possession in the vendor. See *Weeks vs. Weed*, 2 Aik. 64.—Also, *Moore vs. Kelley*, 5 Vt. R. 34. In the latter case, the court say, "There is no intimation that any person whatever knew of the sale, or had reason to suspect it except the vendor and purchaser." In all cases both English and American, where such sales have been declared void, some kind of possession remained in vendor. The case of *Barney vs. Brown*, did not fall within the rule.—2 Vt. R. 377.—See also, 2 Vt. R. 555, *Spalding vs. Austin*. That case varies from this only in one immaterial particular. In that case the sheep when sold were in the hands of the agister who had notice and agreed to keep, &c., the purchaser to pay for keeping. But no stress was laid on that. The purchaser's agreeing to keep the sheep is the only circumstance which tends to vary that from the present. And that cannot vary the case in a legal point of view. We have before seen that the cases have been decided upon the principle of vendor's retaining some kind of possession, and the collusive credit he may get in consequence thereof. Now what difference can it make so far as the public are concerned?—The visible effects are the same; and these visible effects are the turning points upon which the whole system is founded. The heifer was out to keep for the season,—so were the sheep in *Barney vs. Brown*, above quoted.



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The law would imply just such liability on the present plaintiff to pay for the keeping, as the express agreement did on the purchaser of the sheep, Aldrich being bailee of the plaintiff, and not of A. M. Pierce. Consequently, the legal relation between all these parties is the same. Notice of the sale to Aldrich was notice to all the world. The heifer's being out of vendor's possession and in another's, should necessarily put creditors and subsequent purchasers on the inquiry, which if they made, they might get the true information.

There is no pretence of any fraud in fact ; none of the insolvency of A. M. Pierce, between whom and plaintiff, it was no ordinary business transaction. To invalidate this sale, the court are required to go far beyond the established rule, which has already been extended to its utmost stretch. Thus far we have treated the case as though the defendant stood before the court as an officer, with proper authority to attach, &c. But, we apprehend no authority can be produced, nor any argument be satisfactory, to show in an action of trespass, defendant can be allowed to give in evidence a justification under the general issue, without notice, consequently the defendant stands in the same situation as any other stranger driving off another's property unwarrantably. The decision of the county court, however, was correct in the result and we hope it will be sustained.

The opinion of the court was delivered by

COLLAMER, J.—Somewhat has been said in argument, as to the propriety of the court below, having admitted under the general issue, the evidence of the *attachment* by the defendant. The court see no impropriety therein, but in truth that question is only presented in this case. That was decided *for* the defendant, yet the judgment was *against* him. In filing exceptions he takes no exception to what is decided in his favor, and the plaintiff is entirely content with the judgment. The defendant cannot complain of objections, taken by the other party, which were not sustained.

The question entirely relates to the *possession* of this heifer, and whether that possession passed to the plaintiff on sale, so as to vest in him a title as against the creditors of the vendor.

It is well settled law in this state, that possession must accompany and follow the sale of personal property, in order to vest the same as against the attaching creditors or *bona fide* purchasers of the vendor, or, in other words, that the actual possession and beneficial use of the property, by the vendor after sale, is inconsistent

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with the sale, and conclusive evidence against it, so far as relates to third persons, were especially attaching creditors. To this, a sheriff's sale, made by legal authority, is an exception. Still what constitutes this change of possession must be a question which will vary with circumstances. In the case *Barney vs. Brown*, 6 Vt. 374, and in *Spalding vs. Austin*, 6 Vt. R. 555, it was holden that if the property when sold was in the hands of a third person, and he undertook to be the keeper for the purchaser, it was sufficient, though no visible change took place. In *Judd & Harris vs. Langdon*, where the keeper had never been informed by the purchaser, and in *Moore vs. Kelley*, where he had not been informed by either party, and the possession remained with the keeper after sale, it was holden that no sufficient change of possession took place. A middle case is now presented. Here the heifer was in the keeping of Aldrich on a previous contract to keep out the winter, and upon the sale he was fully informed thereof, by both parties.—This constitutes a new case, and is to be decided by analogy and the application of general principles.

Possession is a strong indication of ownership of property, which the law constantly recognizes and regards. This, especially in relation to personal property, is simple, visible and easily understood; and should as far as practicable be made the test of property; and if this be carried back and connected with actual previous ownership we regard it as conclusive for third persons.

When the actual possession of property is in another at the time of sale, such sale is not accompanied with any implied warranty of ownership in the vendor as on ordinary sales. This is on the ground that the purchaser is put on his inquiry, and that on such inquiry he has been informed to his satisfaction, or could require a warranty, in fact. If real estate be in the possession of a third person, the purchaser will be presumed to have notice of any unrecorded deed he may have thereto, from the grantor. This is on the same ground, that is, that he is put on enquiry and ascertained the fact. When the bailee of personal property is fully informed of the sale thereof, both by the vendor and the vendee, he becomes keeper for the true owner by operation of law, and his consent is immaterial; and if the vendor has no further use or beneficial interest in the property, nothing transpires inconsistent with the sale. In the case *Harman et al. vs. Anderson et al.*, 2 Camp. R. 243, where a question arose as to change of possession in relation to stoppage in transitu, where an actual possession has always been holden necessary to prevent the stoppage. In that case the prop-

erty was in the possession of a wharfinger to whom notice of the sale was given by a delivery of the sale note, but he made no transfer in his books, nor accepted the delivery of said note or entered into any undertaking with the purchaser. In that case Lord Ellenboro says:—"After the note was delivered to the wharfinger, they were bound to hold the goods on account of the purchaser. The delivery note was sufficient without any actual transfer in their books. From thenceforth they became the agents of the vendee." In such case in consistency with general principles, all purchasers and attaching creditors are put upon their inquiry and may arrive at truth; and all danger of fraud be counteracted, so far as possession and use are concerned, though no *visible* change has transpired. It is on this ground the cases *Barney vs. Brown* and *Spalding vs. Austin* are decided. There no external, *visible* change of possession took place on sale, of which third persons could take notice; nor did the fact that the bailees undertook to keep for the vendees, render the change any more obvious. But the property was in a third person's possession, which would put all creditors and purchasers on enquiry and result in full notice. But if the property is in the possession of a third person under such circumstances, that on inquiry from him the sale would not be learned, then this security entirely fails. Therefore, if the keeper be not informed of the sale, as in the case *Moore vs. Kelley*, or if he be only informed by the vendor who may have given him a wrong account from sinister motive, and whose *ex parte* account was entitled to no credit, as in the case of *Judd et al. vs. Langdon*, then the security of notice which the law requires entirely fails, and the possession cannot be considered so changed as to be regarded by creditors. In this case the property was in the possession of a bailee, and this puts all concerned on inquiry. He was fully informed of the sale both by the vendor and vendee and so became keeper for the vendee. Thus the possession was changed with the sale, and creditors and purchasers were furnished with legal means of knowledge, whether the bailee entered into any express undertaking with the vendee or not.

Judgment affirmed.

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JONATHAN TAYLOR vs. L. F. GALLUP and J. A. GALLUP.

If A agree with B to pay him the amount of an account due A & B jointly from A & C, the sum to be ascertained by a person named, and to be paid within one year from the date of the bond, the procuring the arbitrator to state the sum due, before the expiration of the year, is not a condition precedent; and if the sum be ascertained before suit brought, but after the term of payment has expired, B may still sustain his action.

Conditions precedent must appear to be such by the express terms of the contract, or by necessary implication, or they will be held independent covenants.

This was an action of debt on penal bond for \$4000, with the following condition annexed :

"The condition of this obligation is such, that whereas it is agreed between the parties that the said Lewis F. Gallup shall take all the goods, wares and merchandize and store-furniture belonging to the late firm of Gallup & Taylor, being such property, and at such price as the same shall be ascertained and appraised by Lyman Mower and John Bement, and after deducting the capital invested by the said Lewis F. Gallup, the said Lewis F. and Joseph A. Gallup shall execute to the said Taylor their joint and several promissory note for the balance, payable in one year with interest.

"And whereas it is also further agreed between the parties that the account charged in the company books to Joseph A. Gallup, shall be settled and adjusted by the said Mower and Bement, and the balance thereon found due to said firm shall be charged by said Mower and Bement to the said Lewis F. Gallup in his account on said company books: And further, that the said account of said Lewis F. Gallup, then so standing on said company books, shall be settled and adjusted by the said Mower and Bement.

"And whereas it is also further agreed between the parties that in case the amount which is to be placed in the hands of the said Jonathan Taylor, for the payment of debts due from the firm of Gallup & Taylor, being the demands due to said Gallup & Taylor, and other property, as the same shall be ascertained and fully adjusted by the said Mower and Bement, with such provisions and allowances as they may make, (a full and complete inventory and account whereof shall be kept by them,) after deducting therefrom the capital of said Taylor, shall prove insufficient to pay said company debts, the said Lewis F. Gallup and Joseph A. Gallup shall pay to said Taylor, in one year from the date hereof, the amount of such deficiency, and also his equal share of the profits.

"*Provided however*, That they shall not in any case be liable to pay said Taylor a greater sum than the balance of said Lewis F. Gallup's account, with interest.

"But if the appropriation to be so made for said Taylor for the payment of said company debts shall be sufficient for that purpose, then the said Lewis F. Gallup and Joseph A. Gallup shall pay to

said Taylor the one half of the balance of said account, so to be adjusted, with interest, in one year, as and for his share of the profits of said concern.

"*Provided*, That nothing contained in the condition of this obligation shall be construed to discharge the said Lewis F. Gallup from his obligation to contribute his equal share to the payment of said company debts, should the appropriations aforesaid, and the balance of his account, prove insufficient for that purpose.

"And whereas it is further agreed that should any question arise relative to the construction of this instrument, or any part of it, or relative to the amount of company debts, which the said Taylor shall pay; or relative to the appropriations thus made; or relative to the amount of the balance of said account, or the part thereof to be paid in one year; all such questions shall be submitted to the award of the said Mower and Bement, or the survivor of them, or, in case of their decease, to such person or persons as may be nominated by their administrator or administrators, and such arbitrator or arbitrators may be called upon, or convened, to decide any such question by either party giving the other three days' notice, and in case of the non-attendance of such party, the arbitration may proceed *ex-parte*, unless reasonable excuse for the absent be rendered to the satisfaction of said arbitrator or arbitrators; and the decision of such arbitration, in any matter submitted by virtue of these presents, shall be final and conclusive between the parties.

"Now if the said Lewis F. Gallup and Joseph A. Gallup shall fully keep and perform all and every part of the agreements above recited on their part to be kept and performed, and all and every part of the conditions aforesaid on their part to be performed, then this bond shall be void—otherwise remain in full force.

"LEWIS F. GALLUP, (L. s.)

"JOS. A. GALLUP. (L. s.)

"Witnessed by LYMAN MOWER."

The defendants crave oyer of the bond, and after setting out the condition, they plead performance of the first condition, and in excuse for not performing the two subsequent stipulations in the condition, they say that

The plaintiff did not procure said Mower and Bement to settle and adjust the account of Lewis F. Gallup, due to the partnership, *within one year* from the date of said bond, in the manner set forth in said instrument—relying upon this as a condition precedent, to be performed by plaintiff.

The plaintiff replies certain matters in excuse for not causing the same to be adjusted *within one year*, i. e., that one of the defendants, by his negligent manner of keeping the book, rendered it impossible to ascertain the amount due from and to the firm, within one year; but that it was subsequently done, and the account of

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defendants also adjusted, and this before the commencement of the action. To which defendants demur, and plaintiff joins.

*T. & E. Hutchinson for plaintiff.*—There seems to be nothing in the pleadings in this case, on which the defendants can light, to get rid of paying this debt, unless they can convince the court that the settling the accounts in question by Mower and Bement within a year from the date of the bond, is a condition precedent to any liability of the defendants, ever to pay the balance due.

It should be borne in mind, in the outset, that here is no creation of any new debt in favor of plaintiff against defendants, but only a stipulation about ascertaining the amount of an existing debt, or, rather, two existing debts, and about the payment of such amount, when ascertained.

It appears that each defendant owed the plaintiff; but the amount was uncertain: and they agreed with the plaintiff upon two men to examine the accounts, and ascertain the sums due, and put them together into one sum; and the defendants became jointly holden for the payment of this sum, or, rather, they became surety for each other for the payment of it.

Now, we contend that the plain, well-settled rule of giving full effect to the intention of the parties, should govern in this case.—

In 6th Term Rep., *Porter vs. Shephard*, on page 668, Lord Kenyon is represented as saying—"It has frequently been said, that conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and that technical words (if there be any to encounter that intention) should give way to that intention."

Again, in 3d John. Rep., *Jackson vs. Myers*, Ch. J. Kent's opinion on page 395 is, "That the intent, when apparent, and not repugnant to law, will control technical terms; for the *intent* and not the *words* is the essence of every agreement. The construction must be upon the whole instrument, and with an endeavor to give every part of it meaning and effect."

The same principle is recognized in 3d Term Rep., *Pomeroy et al. vs. Parkington et al.*, in the opinion of the court, on page 675. Likewise in 2d Cowper, *Goodtitle vs. Bayley*, a part of Lord Mansfield's opinion, on page 600.

Pursuant to these principles, the contract in question should be construed as if the wording, as to the time of payment, were, that the defendants should not be obliged to pay this amount of their debts due to the plaintiff sooner than a year from the date of the

bond. This is the fair construction of the instrument, when the whole is viewed at once. The waiting a year from the date of the bond, for debts already due, could be no beneficial object for the plaintiff. It must have been considered an indulgence in the plaintiff for the benefit or convenience of defendants. Therefore, to construe, so that this provision, intended for the benefit of the defendants, could by possibility annul and defeat the connected provision, intended for the benefit of the plaintiff, would be disregarding the original intention of the parties, and disregarding the whole salutary principles of construction here brought to view, from the respectable authorities above cited.

We are under no necessity for contending against the decision in the case of *Porter & Porter vs. Stewart*, on which defendants rely. That case was governed by that law in the books which protects a defendant obligor against being saddled with a penalty, unless the obligee has punctiliously performed every thing on his part to be performed, to entitle him to that penalty.

That law is in no sense applicable to this case: First, we are not contending for a penalty. Every thing in the pleadings about penalty, is mere form. The essence of our claim is the amount of our debt, honestly due from defendants.—Secondly, that which the defendants urge, as a condition precedent, was to be effected no more by plaintiff than by defendants. In fact, both parties had, by their written instrument, transferred the result to Messrs. Mower and Bement; and it was as much the duty of defendants as of the plaintiff, to aid in bringing forward that result. No wonder that defendants threw obstacles in the way of progress in settling the accounts, if they had conceived the notion, as their attorney now contends, that dragging out the business beyond the year, would discharge them from their debt altogether.

The replication charges the delay to have been induced by circumstances under the control of defendants, and not under the control of plaintiff. We are well warranted in urging this as a reason why the court should not consider that, as a condition precedent on the part of the plaintiff, which the parties could never have thought of in that view, when they made the contract.

But, as we are not urging to recover a penalty, but only our honest debt, we will produce a case or two in point, to show that the defendants are bound by the waiver set up in the replication.

We cite the 13th of Mass. Rep. 396, *Montague et al. vs. Grace Smith*, where it was decided, that the choosing arbitrators and proceeding with the arbitration after the time for that purpose stipula-

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ted in a case had expired, was a waiver of all privilege resulting from the lapse of time.

In 4th of East's Rep. 477, *Hall vs. Cazenove*, plaintiff brought his action upon a charter party, to recover freight. The defence was, that plaintiff neither averred nor proved the performance of a condition precedent, expressed in the charter party. The plaintiff, in excuse for this failure on his part, was permitted to prove, that the charter party was not concluded and delivered till after the time mentioned in the charter party for the performance of said precedent condition.

The law seems well settled, that a plaintiff can take no advantage of any neglect of the defendant, to which he has assented, or of which he has been himself the cause.—See 3 John. R. 528, *Fleming vs. Gilbert*.

Just so in cases of assumpsit, or where plaintiff does not go for a penalty, the plaintiff may show the fault of defendant in excuse for himself. See 5 John. R. *West vs. Emmons*, in the opinion of the court, on page 180, that it was sufficient for plaintiff to aver his readiness to execute to defendant a mortgage deed, and that defendant refused to execute a deed to the plaintiff without averring that he in fact executed the mortgage deed, and was ready and offered to deliver the same.

See also 16th Mass. Rep. 161, *Newcomb vs. Bracket*, where it was decided that the defendant's putting it out of his power to perform, excuses plaintiff from performing a condition precedent; and the plaintiff recovered damages for the breach of contract.

So in 7th Cowen's Rep. 24, *Frost vs. Clarkson & Clarkson*.—It was decided that plaintiff might recover back his money paid, by showing that defendants had put it out of their power to fulfil the contract on their part.

So in 5th Pick. Rep. 425, *Whte vs. Snell*.—It was decided that on a promise of defendant to pay plaintiff when defendant should recover his debt of A. Plaintiff might recover on the general counts, or any declaration drawn to meet the case, on proving that defendant had no debt against A, or that he had used no diligence to collect it.

Thus there is no difficulty in the court's doing justice in every case, by selecting those principles which are applicable, and applying them so far as applicable, and rejecting those principles which should govern other and different cases.

What, then, is the justice of the case before the court? The plaintiff has a debt against each defendant. Both and each of de-



defendants acknowledge the debts to be just, but neither party knows the exact sum. Moreover, defendants are not quite ready to make payment. They want to omit payment till the expiration of one year, which both parties supposed would be sufficient time for ascertaining the sum due. They agree upon men to fix that sum, and defendants bind themselves, jointly and severally, to pay at the end of the year. But the defendants throw obstacles in the way, or, to say the least, obstacles are in the way, which plaintiff never put there, and which it behoved defendants to remove forthwith, and which they never removed until the year expired—during which, the plaintiff had consented to wait; and now defendants wish to avoid their debt wholly.

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Once more: The very terms of the writing, appointing Messrs. Mower and Bement to settle these accounts, and ascertain the sum due, submits to them, also, the construction of this contract. And they have virtually put upon it the construction we contend for.—Their very proceeding, and adjourning from time to time, and hearing the parties long after the year expressed for payment had elapsed, is an unceremonious construction that their powers had not ceased. The conduct of the defendants, in going before this board, and making their exhibits from time to time, after the year had expired, was a consent that Messrs. Mower and Bement should so construe the contract; and was a tissue of assertions, that they themselves put the same construction upon it.

That such submissions and awards are favored, and receive a liberal construction, see Hyde on Awards, pages 21, 22, 26, 27, 28, 29, 33, 173, 228, 229.—Same, pages 230, 233, 242, 243.

*Axa Aikens for defendants.*—The question raised by the pleadings in this case is, we conceive, involved in, and depends upon the legal construction of the defendants' bond.

The bond is conditioned for the performance of certain covenants therein contained. The first of these, it is admitted, has been performed according to its tenor and effect. The others (being for the payment of money by a certain day therein limited and set) are themselves conditional, being predicated upon the happening of certain contingencies, without the happening of which, the obligation of the covenants did not arise, and could not, by possibility, be discharged within the time limited and set.

The facts set forth in the plea in bar, (and which are admitted by the replication,) show that the penalty of this bond (for which this suit is brought) has never been forfeited; and that the bond

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has become extinct through lapse of time, and the non-performance of the conditions precedent, or the *not happening* of the contingencies, or some of them, within the time, which alone would liquidate the sum, and give to the plaintiff a right to demand it.

A bond which has become extinct cannot be revived, except by deed, if at all.—*Craig vs. Talbot*, 2 B. & C. 179.

The replication, therefore, which, after admitting the non-performance of the conditions precedent, attempts to avoid the legal consequence, by setting up a *waiver* by parol, or matters *in pari*, is clearly bad.

I propose, therefore, to confine my remarks to the sufficiency of the plea in bar.

Three things were contemplated by the parties to this bond, which must happen, before the liability of these defendants to pay, in virtue of these covenants, was incurred :

1st. That the account charged on the company books to Doct. Gallup should be settled and adjusted by Mower and Bement.

2d. That the balance found against him (if any) should be charged by Mower and Bement to Lewis F., and that the account of Lewis F. then so standing on the company books, should be settled and adjusted by said Mower and Bement, and the balance found.

3d. That Taylor, with the funds placed in his hands for that purpose, was to pay the company debts, if the fund was sufficient ; and if not, that the deficiency was to be proved or made to appear.

On these things having been done, the obligation devolved on these defendants to pay to Taylor, *within one year from the date of the bond*, i. e., before the first day of May, 1831, the amount of the *deficiency of the fund*, (if there proved to be any,) provided it did not exceed such balance of Lewis F.'s account, and interest.—But if there was no deficiency in the fund, then they became obligated to pay within the same time the one half of that balance, as the share of Taylor's profits.

Now, of these prerequisites to the liability of the Messrs. Gallups, they have averred performance of all it devolved on *them* to do—i. e., the placing the books in the hands of Mower and Bement, and the delivering the funds.

The fact is admitted in the replication ; but an attempt is made to avoid its effect, and the legal effect, the non-performance of the duties confided to Messrs. Mower and Bement, *and the duty of Taylor*, by alleging that Lewis F. Gallup, pending the partnership, had, by *mistakes*, and omissions to give proper credits, so entangled

the partnership affairs, as that Taylor could not have the account of Lewis F. adjusted and the balance declared, nor ascertain the deficiency, within the time limited in the bond.

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This, we insist, is a *departure* in pleading, and a naked attempt to resuscitate a bond, which, by its own limitation, had become extinct. This cannot be done.—*Porter et al. vs. Stewart*, 2 Aik. 424—3 T. R. 590—2 Con. R. 71—there referred to.

The action being brought for the penalty of the bond, the plaintiff must show a strict performance of the precedent conditions on his part to be done.—*Porter vs. Stewart*, *ut supra*.

The question then turns upon the legal construction of the bond—the *intent* of the parties at the time of its execution, as legally inferable from the language they have used in reference to the apparent object to be effected. This object was a speedy and final close of the concerns of Gallup & Taylor, so far as they affected Lewis F. Gallup.

When such was the object, and such the covenants, can it be pretended that *time* did not enter into the consideration of the parties? Indeed, no other consideration existed—no other motive on earth can be assigned why Doct. Gallup should enter into this penalty, but his desire to have brought about a speedy and perfect settlement of the affairs of that partnership between Taylor and his son.

As a limited and short period for the winding up of the affairs of that partnership was the object, so it was by express terms made the essence of the contract.

The *covenant is not* to pay *within a year*, from a deficiency being made to appear; but, within a year *from the date* of the bond, *if a deficiency do appear*. This deficiency (if any) was to be ascertained by a comparison of the *value* of the fund (when adjusted by proper allowances) with the known debts.

Now, there is no difference between a covenant *to pay within a year from date*, if a contingency happen, and a covenant *to pay*, if a contingency happen *within a year from date*. For, in either case, the *contingency* must occur within the *time*, or the condition is not broken.

Again: The law secures to a party obligor the right to discharge himself from his obligation by a *tender*. These obligors had limited themselves to a year. They had the right to be discharged at that time, if the sum *was found*, by payment or tenders—if it was *not found*, the obligation is at an end.

In this respect, the obligation does not differ from ordinary arbi-

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tration bonds—to which, no award by the day, is always a bar.— And the inherent difficulties of the case are no answer to such plea.

But there were no such difficulties here. The referees for that purpose, had only to adjust the account then standing on the books, and the first precedent step was accomplished—that is to say, the *maximum* of the defendant's liability would have been thereby ascertained.

The next step, after what the defendants had done, was also the exclusive work of the referees, and in the way of which the Gallups could not (if they would) throw any obstacle. It was to *ascertain* and *adjust*, by *proper allowances*, the *value of the fund*.

The fund having been passed over to Taylor, its value might have been ascertained in the mode prescribed, any day. But it was not done. Taylor had unfortunately imbibed the erroneous idea that he could make Doct. Gallup accountable through this bond for the effects; and therefore it was that the referees were prevented by him for four years and upwards from valuing the fund or adjusting the balance of the account.

On comparing the amount of the partnership debts with the amount of the *fund*, as adjusted and appraised by Mower and Be-ment, the extent of the liability of these defendants, on this bond, would have been seen at a glance.

If there had been no deficiency, the half of the balance of Lewis F.'s account, so adjusted, would have been the sum to have been paid as Taylor's share of the profits. If there had been a deficiency less than the the balance of the account, the amount of the deficiency, and half the balance of the account, after deducting the deficiency, would have been the sum. If the deficiency had been equal to, or exceeded the balance of the account, that balance would have been the sum to have been paid.

The fixing the liability of the defendants and its amount in the manner stated, was not a duty assumed by them. It was placed beyond their power and control, by the terms of the contract.—The right, the power, and I may add the *duty* to have done it within the time, belonged to and was possessed by Taylor. He has neglected it, and the legal consequence is, that he is in the same situation of every obligee of a bond, who fails to obtain an award by the time limited for its performance. His remedy in the bond is extinguished by the efflux of time, and he is thrown back upon the original liabilities of the other party, so far as they remain the same.

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It is right that it should be so; for otherwise, instead of being able to discharge themselves from their liability at the time limited and set, they must be bound to hold themselves in readiness at the pleasure of Taylor, through all time. Even the statute of limitations does not extend its protection to their case.

The object of this bond was the mutual benefit of the *parties*,—its extinction concludes no right which existed before. Their original liabilities to each other survive. The rights of their creditors have never been affected by it. Their claims were upon both, and the property of both before, and they remain so still.

If the *time* were enlarged, by *implied agreement*, as stated in the replication, the action should have been founded on *that*, not on the bond, which *cannot* be revived.—*Langworthy & Clark vs. Smith et al.*, 2 Wendell, 587.

That this view of the case is sustained by the authorities, I refer the court to *Porter vs. Stewart*, 2 Aik. R. 424, and the cases there cited—*Penfield vs. Fillmore*, Brayt. R. 43—*Lord Arlington vs. Merricke*, 2 Saund. R. 411 & n.—*Jones et al. vs. Barkley*, 2 Doug. 684—*Liverpool Water-works Co. vs. Atkinson*, 6 East. 507—*Wardens of St. Saviour vs. Bostwick et al.* 2 Cow. R. 175—13 Petersd. Abr. 769—7 do. 692—*Hassel vs. Long*, 2 M. & S. 363—7 Petersd. Abr. 470, cases 4, 5 & 6—*Couch vs. Ingersoll*, 2 Pick. R. 292—*Langworthy vs. Smith et al.*, *ut supra*.

The opinion of the court was delivered by

REDFIELD, J.—It is well settled, that where the plaintiff sues upon a bond or sealed instrument, depending upon a condition precedent, he cannot recover unless he shows strict performance on his part. Even where the act, constituting the condition precedent, becomes unlawful by legislative restriction, or was originally unlawful or even impossible, or has become so by act of God or lapse of time, the rights and obligations depending upon the performance of such conditions, must fail, unless they be strictly performed.—(See the case of *Porter et al. vs. Stewart*, 2 Aik. R. 424, and cases there cited by the court and counsel.)—That case is so satisfactorily determined upon principle, and so fully sustained by authority, that it would be useless to go farther in discussing its propriety than to say, it is satisfactory to the court and to the profession.

If the matters relied upon in the defendants' plea in bar, as a condition precedent, be such, and no excuse is offered by plaintiff in his replication, sufficient to excuse the performance of such con-

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ditions, then the defendants are entitled to recover. If those matters do not form a condition precedent, or the replication contains sufficient excuse for not performing them as such, then the plaintiff is entitled to recover.

No excuse will exonerate one from the performance of a condition precedent, unless it be the act of the other party. And the act of the other party, in order to excuse such performance, must be either a positive interference and actual hindrance, or some distinct and tangible fraud. No such excuse is contained in the plaintiff's replication. It amounts, at most, to mere neglect or omission of duty, carelessly but innocently committed by defendant. This could not in any sense excuse the plaintiff for not performing a condition precedent, especially as this neglect was that of one of the defendants, and before the execution of the contract.

The only remaining question then, is, Do the facts relied upon by defendants in their plea in bar, amount to a condition precedent? This must be determined by reference to the words of the contract, as set forth in the plea, (and they are the same in both,) with regard to the general subject matter of the contract, and the supposed intention of the parties.

The subject matter of the contract is the settlement of a partnership concern between plaintiff and one of defendants. If the funds put into plaintiff's hands proved sufficient to meet the outstanding liabilities of the firm, then the defendants promised to pay one half of their debt to the firm, to go to plaintiff for his share of the profits; but if there should be a deficiency of funds in plaintiff's hands, after deducting his capital stock, then defendants promised to make up the deficiency to the amount of their whole account. And in either case they were to make payment in one year from the date of the bond in suit in this action. And if the parties did not agree upon any of these matters, they named two persons, to whom such matters, at the call of either party, should be referred. These persons too were named to state the amount due from defendants to the firm.

The matter relied upon by defendants in excuse for not performing their part of the contract is, that the plaintiff failed to procure the arbitrators to state the amount due from the defendants within *one year* from the date of the bond, whereby it became impossible for defendants to perform their part of the contract in the manner stipulated.

The cases upon the subject of conditions precedent, are undoubt-

edly very unsatisfactory, and in many instances very contradictory and almost wholly irreconcilable.

But from all the cases, certain general maxims are deducible, which will enable us very fully to determine how far the matters relied upon as such, really form a condition precedent.

Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it will be treated as a condition subsequent, or independent covenant, and not as a condition precedent, unless so stipulated in express terms.—*Boon vs. Eyre*, 1 H. Black. 273—1 Saund. Rep. 320, c. d.

It is apparent here that the plaintiff did not, in express terms, covenant to procure this settlement within one year, or indeed to procure it at all. It is only by inference from the fact that it was for his benefit, we make out that *he* was to procure it, rather than the defendants, in whose power it equally was.

And if it were to be procured by plaintiff, it is clear that it formed no part, even of the consideration of defendants' covenant.—That consisted in obtaining a release from the liabilities of the firm. It is equally evident, from the whole tenor of the instrument, that the parties never once suspected that the obligation of defendants to pay depended upon plaintiff's procuring the settlement within one year. This term of one year is not affixed to the plaintiff's but to defendants' obligation; nor could it in any sense have been introduced for the ease of plaintiff to extend the time of his performance of his part of the contract; but on the contrary, it must have been introduced for the ease of the defendants, to prevent their being called upon *immediately*, as they otherwise might have been, for the payment of half at least of the amount of their account. And it would almost involve an absurdity to say that because the negligence of plaintiff gave them a still longer term, they were thereby exonerated from all obligation whatever.

So far from the breach of this implied covenant, as it is termed, being on the part of defendants irreparable in damages, it is not a matter from which, in the very nature of things, any pecuniary loss could accrue to defendants. It is but giving a debtor longer day of payment; and if it be in one sense an injury to suffer a man to remain *in debt* beyond the time stipulated for payment, it is not the foundation of an action, but *damnum absque injuria*.

The contract on the part of defendants was to pay one half the amount of their debt to the firm at all events, and the other half in a certain contingency. If they wished to know the extent of their

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possible or absolute liability, they should have proceeded to ascertain the amount in the manner pointed out in the contract.

And it has always been held that mere limitations as to time, introduced in the manner here stated, although one party failed to perform by the day set, the other was not thereby exonerated.—*Cock vs. Castoys*, M. S. cases, decided in K. B. Mich. 2 Geo. IV.—1 Saund. Rep. 320, a.

The case of *Eaton vs. Stone*, 7 Mass. R. 312, is almost the same case with the present. The case of *Mawman vs. Gillet*, 2 Taunt. 326, is much in point, although not the case of a bond, or sealed instrument.

Courts will never construe a contract so as to defeat the object of the parties, or make conditions precedent, unless clearly so expressed.

We feel satisfied such is not the present case. The result is, (as this case comes here by appeal,) this court takes no notice of the judgment below, but only proceed to enter such judgment as that court should have rendered, which is, that defendants' plea in bar is insufficient, and that plaintiff recover the penalty of the bond; and the case, on motion of defendants, was removed to the county court for the final ascertainment of the sum due the plaintiff.

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EMMERSON MORRIS and HILTON, Ap'le. vs. ZENAS F. HYDE, Ap't.

The purchaser of a chattel committed it to the keeping of a third person, who suffers it without the knowledge or consent of the purchaser, to go back into the possession of the vendor, when it was attached by his creditor. *Held*, that the creditor might hold the chattel.

The law requires such change of possession, as indicates to the world at large a change of ownership; and if such possession is not taken by the purchaser, it is no excuse, that he entrusted the chattel to another, who was negligent or unfaithful.

This was an action of trover, for a mare, to which the defendant pleaded not guilty, with notice in writing that defendant attached the same as the property of one Abel Willson.

On the trial by the jury in the county court, the plaintiff's gave evidence tending to prove, that on the sixth day of March 1835, they in good faith purchased the mare of said Abel Wilson and applied the price on debts due the plaintiff's from Wilson *bona fide*, and that the plaintiff's then delivered the mare to a Mr. Wal-



ker to keep for the plaintiffs. That Walker took the mare to his own house.

This was on Friday in Chester, and that afterwards on Saturday Wilson went to Walker and obtained the mare to go to Ludlow, a distance of ten or fifteen miles, without the knowledge or consent of the plaintiffs. That Wilson returned to his own house on Saturday evening and on Sunday night between sun-down and next morning the defendant took the mare from the barn of Wilson.

The defendant gave in evidence the writ and execution, and further, evidence tending to show, that Wilson when on his return from Ludlow to Cavendish, said the plaintiffs permitted him to take the mare, and also, evidence tending to show, that said sale was fraudulent in fact.

The defendant requested the court to charge the jury that if the mare was attached in the possession of Wilson, under the circumstances of this case the plaintiffs could not recover.

The court after instructing the jury as to their being any fraud in fact in the sale of the mare to which there was no exception, further charged the jury that if they found the mare was purchased by the plaintiffs in good faith, by them delivered to Walker to keep, and Wilson afterwards obtained possession of the mare without the consent or knowledge of the plaintiffs, that did not subject the mare to attachments as property of Wilson, if she was attached before the plaintiffs knew of the possession by Wilson. To which charge the defendant excepted.

*Argument for defendant.*—The doctrine of constructive fraud, on the ground of possession being retained by vendor, has been long settled.—*Weeks vs. Weed*, 2 Aik. 64.—*Beattie vs. Robin*, 2 Vt. R. 181.—*Bachelor vs. Carter*, 2 Vt. R. 168.—*Mott vs. McNeal*, 1 Aik. 162.—*Durkee vs. Mahoney*, 1 Aik. 116.—*Judd et al. vs. Langdon*, 5 Vt. R. 235.

By these authorities it is established as the settled law of Vermont, as it has been heretofore understood, that upon the sale of chattels, personal possession in the purchaser, must accompany the sale, and that, in a substantial and visible manner, or the same is constructively fraudulent and void as against the creditors of the seller.

In the case of *Mott vs. McNeal*, 1 Aik. 165, this principle is directly laid down and avowed, that to pass a title to the purchase of personal chattels, a substantial and visible change of possession

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must take place, so that the possession will no longer give a credit to the former owner.

The reason assigned in the last case is, so that possession will no longer give a credit to the former owner.

How does the charge of the judge in this case, correspond with the aforesaid reason.

By the case it appears, that on Friday the horse was pretended to be sold and delivered to the agent of the purchaser, no possession actually or visibly taken by himself, and on Saturday following the seller using the horse as before on a journey of 15 miles.

Now, what evidence of this pretended sale could the creditor have had? none but the possession. But, the possession was with Wilson up to Monday morning after, and in his barn at the time of the attachment.

The possession then, which is admitted to be the evidence of ownership was and continued to be (except a small part of Friday) in Wilson, and was actually his at the time of attachment.

If this mare had gone into the actual and visible possession of the purchaser, at the time and continued in his possession and use for so long a time as to make the fact notorious in the neighborhood, and this possession of Wilson had been only a casual lending with a speedy return of the animal to the owner, it might have merited a different consideration, and might have come within the decision in the 6th vol. Vt. R. p. 521.

That decision goes upon the ground of *a long continued and notorious possession of the animal* by the purchaser.

But, it is contended in this case, that there is not *one* of the alleviating circumstances which appeared in that: For,

1. There was no actual or visible possession in the purchaser at all.

2. No notoriety to any change whatever in the hands of his pretended agent.

3. The mare owned by Wilson Friday morning, in his open and notorious use, and on a journey on Saturday following.

4. The animal remained in his possession over Sunday, until Monday morning, when she was attached.

All, then, of the badges of legal fraud, were present here to warrant the defendant, the creditor, to attach.

*Argument for the plaintiff.*—The court having instructed the jury as to the fraud in fact, to which part of the charge no exception is taken, and the jury having found for the plaintiffs under

the instruction complained of, the general question then is,—  
Was the charge of the court right?

The plaintiffs insist, that the instruction given was *perfectly correct*, and the only one that the case could justly admit of.

The jury found, that the plaintiffs purchased the property in good faith, that they took immediate possession of the same, committed it to their bailee *for keeping*, that without the *consent* or *knowledge* of the plaintiff's, the mare came into the possession of the vendor, and that she was attached at defendant's suit, before the plaintiffs *knew* of the possession having been thus regained by the vendor.

The defendant is, therefore, driven to contend, that this is a case of *fraud in law*. And that this is the only question.

It will be found, on examination of all the cases falling within the class of *legal frauds*, that the vendee has *permitted* the property to remain in, or to revert to the possession of the vendor, or has of his own *volition* done some act *enabling* the vendor to obtain it. But this rule is not absolute and unyielding, for there are cases when the temporary possession and use by the vendor with the knowledge and consent of the vendee has been adjudged not to *divest* the latter.—6 Vt. R., *Farnsworth vs. Shepard*.

On the other hand, there is not to be found a single case in which the title of the vendee has failed by reason of the vendor's re-possession which was acquired, against the consent and knowledge of the vendee.

Great hazard and often-times utter ruin to an innocent vendee would attend the transfer of property fairly purchased, were the rule enforced which the defendant contends for.

If it be indeed immaterial how the vendor regains possession, *then*, had he *stolen* the mare from the stable of the vendee and the creditor had attached her, the vendee must loose his lien. Such is the necessary result of the doctrine urged by the defendant, and the consequences could not be endured.

The reasonable rule is, that when the vendee takes possession of property fairly purchased, and uses the same means to preserve the possession of it which a man of ordinary prudence does to keep his general property, and he loses possession without any consent or knowledge of his own, he does not, ought not to forfeit his property so lost.

It is not deemed necessary to cite authorities, familiarly known to the court and the profession. Yet the plaintiffs would refer to the case of *Farnsworth vs. Shepard*, 6 Vt. R. 521, and 2 Aik. R. 115.

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The opinion of the court was delivered by

**PHELPS, J.**—The rule which requires a substantial visible change of possession, in order to enable the purchaser of a chattel to hold it against the attaching creditor of the vendor, is too well settled in this State, by repeated adjudications, to admit of further discussion.

The possession taken, must be such as will indicate to the world at large the change of ownership. A mere temporary change, if the property revert immediately into the possession of the vendor, is not sufficient.

In this case, we are of opinion, that the temporary possession of Walker, as agent of the plaintiffs was not such as answers the requirement of the law. Had the horse been returned to the possession of Wilson, with the assent of the plaintiff, it seems to be admitted, the title of the plaintiffs could not be sustained. But it appears in this case, that such assent was not had, and it is argued, that the act of the agent, being unauthorized by the plaintiffs, they are not to be affected thereby.

It is true, as a general rule, that a party is not to be made responsible for any positive act of another, unless done by his authority or direction, express or implied. But it is also true, that where an act is necessary to consummate or perfect the right or title of a party, and such act is omitted, through the neglect or disobedience of an agent, the party who commits his rights to the fidelity of such agent, must bear the consequences. In this case, it was the duty of the plaintiffs to see that their purchase was followed by a sufficient change of possession, and if they entrust the business to an agent, they are responsible for the agent's fidelity.

Had the possession been taken and retained by the plaintiffs, in such manner, and for such length of time, as would have answered the requirements of the law, and the property had then been entrusted to the vendor, temporarily and for a special purpose, the case would have fallen within the doctrine of *Farnsworth vs. Shepard*, cited in the argument.

Judgment reversed, and cause remanded to the county court.

## THOMAS EMERSON vs. BANI UDALL.

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Whether it is a good defence, *at law*, to a suit on an award, that the same was obtained by fraud, *quere*.

If it be, *Held*, that it cannot be avoided by showing merely that a claim presented to the arbitrators, and by them allowed, had been previously paid, and that known to the party.

Nothing is available, in this way, except facts, which do not come within the scope of the award, and, from their nature, are not concluded by it.

This was an action of debt on judgment. Plea, *Nul Tvel Record*, and also a plea in offset, stating, that at the term of the county court, when the judgment declared on was rendered, June term, 1829, the defendant had considerable claims for payments, and demands to set off against the claims of the plaintiff in that action: that it was then agreed that the defendant should suffer judgment to go by default in that action, and he make no defence, but suffer judgment to pass for the whole of the plaintiff's claim; and that his claims against the plaintiff should be adjusted by Willys Lyman and Harvey F. Leavitt, and that whatever they allowed should be admitted as payment on the judgment: That Lyman and Leavitt afterwards, to wit, on the 23d of November, 1830, did adjust his claims, and allowed him \$116 47, which the plaintiff has hitherto refused to accede to.

To this the plaintiff pleads *non-assumpsit*, and to the first plea replies, "there is such record."

On the trial of the issue by jury, the defendant read in evidence the award in writing, signed by Willys Lyman and Harvey F. Leavitt—the execution thereof being conceded.

The defendant introduced testimony to prove that at the term of the county court at which the plaintiff's judgment was obtained, to wit, at June term, 1829, said Udall claimed to have demands to file in offset to the claims of said Emerson and Davis, then in suit. And that said Emerson then agreed with said Udall that judgment should be entered for the then plaintiffs for the whole amount of their claims described in their declaration, and they and said Udall would adjust the claims of said Udall among themselves, and if they could not agree, the same should be adjusted by their counsel in said suit, to wit, Harvey F. Leavitt then attorney for the then plaintiffs, and Willys Lyman then attorney for the defendant; and the amount, if any, found due the defendant, should be allowed on said judgment, or on the execution issued thereon. Thereupon; judgment was entered for the then plaintiffs, as described in the present declaration; that execution was not delivered out till two or

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three months before making said award, before which time said Leavitt had wholly relinquished the practice of law, and removed from Hartford to Strafford, and ceased to be the attorney of the plaintiff: That William Strong continued to be the guardian of said Davis until his decease in October, 1829: That said Strong, being the father of Davis' wife, by previous appointment in August, 1830, met the plaintiff and defendant, and they attempted between themselves to adjust the claims of said Udall: That he then presented his order for oats, (mentioned in said award,) which they refused to allow him; and thereupon, the parties separated. And afterwards, and before the time of making said award, the said Emerson informed said Leavitt, that said Leavitt and said Lyman must adjust said business, or he should do nothing further about said matter: That afterwards said Strong, by consent of said Emerson, took out execution on said judgment, on which some payments were made by said Udall: That a few days before the making of said award, the said Udall called on said Leavitt, at Strafford, and requested him to attend to the adjusting of his said claims, and said Leavitt having some engagements of another character, appointed a time to attend to said business at the office of Willys Lyman at White River Village in Hartford, being the next Saturday, being as short a time as he, said Leavitt, could go, after being discharged of his other engagements, and he wrote by mail to said Emerson at Windsor, where he then resided, informing him of said appointment, allowing him as much time after receiving said letter by due course of mail, to go to said Hartford from Windsor, as said Leavitt would have, after discharging his previous engagements, to go from Strafford to Hartford. No notice was given to said Strong. At the time and place so appointed, the said Leavitt and Lyman met, and said Udall attended; but said Emerson did not attend, nor said Strong. The said Leavitt and Lyman both testified that they had not before that time heard of said claim of said Udall for money collected by G. E. Wales, Esq., mentioned in said award: That said Leavitt and Lyman proceeded to the adjustment of the claims of said Udall, and among other testimony by them examined, they administered an oath to said Udall, and examined him in relation to his claims, or some of them; and after examination, they made and signed their award aforesaid.

The defendant introduced testimony further tending to prove, that after making said award he commenced an action thereon against said Emerson, returnable to Windsor county court, and the said Emerson told the attorney of said Udall that he supposed it

had been applied, and that it should be, and he would pay the cost which had been made in said action—whereupon, the said attorney neglected to enter said suit, and that said Emerson made no mention of his not having received due notice to attend said arbitration, or any other objection thereto.

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The plaintiff introduced testimony tending to prove, that said Udall's claim, described in said award as an order for oats, was a false claim, as he had received the oats on the order of Hyde Clark.

The court decided, that if the arbitrators kept within the submission, nothing short of corruption in the arbitrators would vitiate the award.

The plaintiff insisted—1. That the decease of Davis operated as a revocation of determination of said submission.

2. That if said Udall was guilty of procuring unjust claims to be allowed by said arbitrators, it was a fraud, and would vitiate the award.

3. That the proof of notice to said Emerson was wholly defective without further proof that he actually received said letter a reasonable time before said hearing, to go and attend it.—

And requested the court so to charge the jury.

The court charged the jury that they would first inquire whether the defendant had proved there was such a submission as the defendant, in his plea, alleged; and if the same was proved, the death of Davis did not determine the same. If they found said submission proved, the jury would next find whether, by the testimony, it was shown that said Emerson had notice a reasonable time before the hearing by the arbitrators, to attend to the same. That in deciding this point, the jury would consider the proof in relation to the letter being sent by mail, in relation to which, in the absence of any proof to the contrary, the legal presumption would be, that Emerson received the same in the ordinary course of mail; and in deciding this point, the jury might also consider the testimony which tended to show that when Emerson was afterwards sued on the award, he made no objection to it, nor suggested that he had not received timely notice: that if the jury did not find that said Emerson received reasonable notice of the time and place of hearing, so that he might have attended, they would find for the plaintiff; but if they found that he had reasonable notice, they would next inquire whether said arbitrators kept within the powers of the award, for they could award only of these demands which had been agreed to be submitted to their adjustment: That if the jury found the

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submission proved, and notice to Emerson seasonably given, and that the award contained only such matters as were submitted, then they would find for the defendant, unless said arbitrators were guilty of corruption—in which case, or if the defendant failed by his testimony to prove either of said other points, then they would find for the plaintiff.—Plaintiff excepted to this charge of the court.

*T. Hutchinson for plaintiff*—contended, That the court erred in their decision and instructions to the jury, “that if they should find the matters awarded upon,” &c. &c. (as in said charge named) “they would find for the defendant, *unless* they also found corruption in the arbitrators—in which case, they would find for the plaintiff,”—whereas, the further instruction ought to have been given, or incorporated with that given, “that if they should find that said award was procured by the fraudulent conduct of the said Udall, imposing upon said arbitrators claims which he knew to be groundless, they would find for the plaintiff.”—See 6 Vesey, jr. 70, *Walker vs. Frobisher*—17 John. R. 405, *Van Courtlandt*, &c. &c. &c., on page 410, and opinion of Senator Allen on page 425, sec. 3.—Also, 18 Com. Law Rep. 242, *Sacket vs. Owen*.

We also contend, that though we *may* apply to chancery to set aside awards in all cases where we are otherwise destitute of proof, yet we are not obliged so to apply, when we rely upon the fraud of the party only.—See said case of *Sacket vs. Owen*.

But if we charge corruption in the arbitrators, we must make them parties to a bill for relief.

We further contend, that said court, instead of leaving to the jury the question of reasonable notice or not, should have instructed them, that all the notice concerning which there was any testimony, was not reasonable notice.—18 Com. Law Rep. 244, anonymous—Chitty's Gen. Prac. vol. 2, p. 96—1 Term Rep. 167, *Tindall et al. vs. Brown*.—8 Petersd. R. 165, 178–9. Also, that the instructions were incorrect as to the effect of the decease of Davis.—18 Com. Law Rep. 63, *Cooper vs. Johnson*.

*Marsh & Williams for defendant*.—The first point is, that the death of Davis, the insane partner, operated as a revocation of the agreement to submit.

Our answer to this is, Davis was *civiliter mortuus* when the agreement was made, 'as appears from the fact that when the first action was instituted, Strong was his guardian, and the *tiro*, who made the declaration, declared in the name of the guardian and of the sane partner.



Emerson made the agreement for the partnership—Davis being incapable of doing any legal act ; and whether he lived or died, could have no effect upon the agreement.

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Again : Emerson, after the death of Davis, informed Lyman and Leavitt, that they must go on and adjust the business. If it does not appear to have been after the death of Davis, the court may well presume that the jury so found the fact. This was a confirmation, of the submission when Emerson, the surviving partner, alone could act.

But the more important ground is, that this was an agreement in its nature irrevocable. It was made on a valuable consideration. The defendant gave up the privilege of shewing payment on the notes sued. The plea alleges *that the defendant had certain payments to prove, on which he meant to insist*, as well as claims to offset, and this fact the jury have found. By omitting to prove payments on the notes in suit, he lost, forever, all claim for such payments. The persons agreed on would have had a right, and it would have been their duty to have proceeded, if both plaintiffs had deceased, or if they had attempted to revoke the agreement. And under such circumstances, the decision would have been imperative on executors, if the parties were dead, and on the party, if living.

The statute of limitations might have run, and probably had run on the defendant's claim in offset.

It is contended that one partner may submit to arbitration any controversy relating to the partnership concerns ; and so it was ruled in the case of *Skillings vs. Coolidge & Oliver*, 14. Mass. R. 43-45. If so, it could make no difference whether Davis was dead or living. As Emerson made the agreement, and expressed no dissent from it for a year, it may be regarded as an agreement to submit after the death of Davis. Davis died Oct. 1829. The award (if it should be called one) was made in November, 1830.

The second point on which the court was requested to charge for the plaintiff was, That if the defendant was guilty of procuring unjust claims to be allowed by the arbitrators, it was a fraud, and would vitiate the award.

The decision of arbitrators, who keep within their submission, and are not shewn to have acted corruptly, is as imperative on the parties as that of any other court.

The question, as to what was submitted, is a question of fact, and was, in the charge, submitted to the jury as such, and they have found that all the matters decided on were submitted.

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By a general submission, the law, as well as the fact, is left to the arbitrators, and their award conclusive.—*Jones vs. Boston Mill-dam Company*, 6 Pick. R. 148.

Awards are to be expounded liberally.—*McKinstry vs. Solomons*, and *Solomons vs. McKinstry*, in Error.—2 John R. 57—13 John. R. 27.

In *Jackson vs. Ambler*, (14 John. R. 96, 105,) it is said, where an arbitrament takes place by the mere act of the parties, it cannot be made an objection that the award is against law.

An award is binding, both as to law and fact, and even in ejectment the party against whom the award is, is estopped from setting up title.—*Selleck vs. Adams*, 15 John. R. 197.

And under an award in relation to land, the defendant may justify in trespass.

The court were requested to charge that the notice to Emerson, the plaintiff, was wholly defective without proof that he actually received the letter in a reasonable time to go to and attend the hearing.

The letter giving him notice of the time and place for hearing, was put into the mail so as that according to the course of the mail, he would receive it a reasonable time before the hearing for him to attend. And the charge on this point was, that the presumption of law was that he received it in due course of mail, unless the contrary was shewn. This was doubtless correct.

The letter sent by mail was sufficient. The presumption of law as stated by the court, in the absence of all proof to the contrary, is, that the letter was received in due course of mail. This, with the subsequent conduct and declarations of Emerson, that he supposed the sum allowed had been applied, and if not, it should be applied, and at the same time making no objection to the sum, nor on account of not having received notice, must, surely, satisfy every one else, as it did the jury, that there is nothing in the pretence of want of notice.

This last fact being left to the jury, the court, we think, are bound to believe was credited by them; and if so, it renders the doings of Leavitt and Lyman imperative on the plaintiff. It was waiving all objections to the award, and binding himself to observe it; and is of itself, if pleaded in another court in offset, a complete answer to the declaration.

The opinion of the court was delivered by

PHELPS, J.—Exception is taken to the charge of the Judge, at the trial in the court below, upon the ground of his refusal to charge

upon sundry points relating to the award pleaded in offset, as requested by the plaintiff. And several points are made here for our decision.

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First, it is argued, that Emerson, the plaintiff, and Davis, his co-partner, being joint parties to the submission, the decease of Davis, before the award was made, was, in legal effect, a revocation of the submission. In reply to this, it need only be said, that whatever might be the legal effect of the decease of Davis, it was competent for the surviving parties to proceed with the submission, in the same sense that it was competent for them to submit their differences after his decease. The submission, being by parol, could be enlarged or extended by parol, and the arbitrators having proceeded by express direction of the plaintiff, after the decease of his partner, it certainly is not competent for him to object their want of authority.

Secondly, it is insisted, that the notice given by the arbitrators of the time and place of hearing was not sufficient. This point was left to the jury, upon the reasonableness of that notice, and very properly, as we apprehend. The case has been compared to the case of negotiable paper, where the sufficiency of the notice is matter of law. But, in our opinion, the cases are widely different. In the case of negotiable paper, the law requires immediate notice, as a matter of strict law, and as a condition precedent to the right of recovery. The sufficiency of the notice does not depend upon its reasonableness, under the circumstances of each case, but upon its conformity with certain established and arbitrary rules, universally acknowledged, and which, from this circumstance, are regarded as making a part of, and qualifying the contract. Hence they must be as strictly conformed to, as if expressly incorporated into the contract. And a jury have nothing to do with the reasonableness of notice in such case, any more than they have with that of any rule of law, which is founded, not so much upon the equity of the case, as upon considerations of general expediency. But in this case, all that the law can require is *reasonable notice*. The object is merely to enable the party to prepare for trial; and if this purpose is answered, the law is satisfied. Whether notice, in any given case, is sufficient for this object, depends altogether upon the circumstances of the case, and becomes, in this view, a mixed question of law and fact, proper for the consideration of a jury.

Thirdly, It is objected that the court erred in omitting to charge the jury, that fraud in the party, in obtaining the award, will vitiate it.

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We deem it unnecessary to follow the counsel in the discussion of the question, whether fraud in obtaining an award will furnish an available defence at law to an action on the award. For we may concede to them the general proposition, and yet it will be no difficult matter to sustain the charge.

The facts relied on by the plaintiff, as constituting the fraud, which he insists is sufficient to avoid the award, consist merely of the assumption that the claim presented by the defendant to the arbitrators, and by them allowed, had been previously paid, and the inference that the defendant was cognizant of the fact. It is obvious that if such a defence were admissible, courts of law could be required, in all cases, to re-examine the decision of the arbitrators, and that the award would be divested at once of its conclusive character. The question whether a claim allowed by arbitrators be well or ill founded, would, in most cases, be a question for the jury to decide; and the question as to the knowledge of the party would always be so. Such a defence, if admitted, would necessarily open the original controversy, and the award would be no more than *prima facie* evidence. The validity of the award would depend upon the original merits of the controversy, and the party who seeks to enforce it would be compelled to rely, not so much upon the determination itself, as upon the evidence upon which it was originally obtained. At the same time, courts would be compelled to set aside an award, whenever their opinion, either as to the law or the inferences of fact to be drawn from the evidence, differed from that of the arbitrators. While the party, in order to avail himself of the award, must be always prepared to sustain its propriety by evidence of the legality and justice of his claim.

In short, the award is in itself conclusive of the legality and justice of the claim, and of all inferences to be drawn from its legality or falsity. And to avoid it upon the score of fraud, it becomes necessary to prove facts not within the scope of inquiry before the arbitrators, and from their nature not concluded by the award. Such cases may exist, and a positive fraud may be proved, without impugning the conclusive character of the award. But we are all of opinion, that something more is necessary for this purpose than simply to shew that the claim was unfounded, and that it is fairly inferable from the evidence exhibited, that the party was cognizant of the fact.

Without deciding whether a court of law can entertain such a defence, we think the charge of the county court correct, upon the

ground that the award cannot be impeached in the manner here attempted, and upon the evidence exhibited.

Judgment affirmed.

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**D. Rix Administrator of J. SMITH vs. The Heirs of J. SMITH.**

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An administrator advancing money, in good faith for the estate, and being guilty of no neglect nor unreasonable delay in converting the effects into money, will be allowed interest on his advances.

So, where he applies for an order of sale, to satisfy a balance due him, which is resisted by the heirs, he will be allowed his services and expenses in closing the trust, provided he succeed in establishing his claim. But if his claim be found unfounded, it is otherwise.

The sentence or decree of the probate court is conclusive, as to all matters, which appear from the record to have been actually adjudicated upon. But claims by or against an administrator, which are not brought under consideration in the adjustment of his account, are not concluded by the finding.

An administrator settled his account in 1820. In 1832, (the estate not having been fully settled in 1820,) he applied for a settlement of a subsequent account, which was done—upon appeal from the decree of the probate court upon the last adjustment, held, that it was not competent to overhaul the settlement of 1820, or to correct any errors occurring therein.

After argument by

*Aikens and Edgerton*, for the Heirs of Smith & Hubbard, and  
*Freeman and Hutchinson*, for the Administrators,

The opinion of the court was delivered by

**PHELPS, J.**—The case comes before us upon exceptions to the report of the commissioners appointed to adjust the account of the administrator.

As both parties have excepted to the report, and thus brought into controversy the claims on both sides, it will be convenient to consider, first, the claims of the administrator with the objections thereto, and secondly, the claims of the heirs upon him which are also objected to.

The claims of the administrator, as presented by him to the commissioners, are as follows, viz :

1. Balance of his account, as adjusted and settled by the probate court in January 1820, \$332,58.
2. Interest on the same, from January 1820 to the present time, 262,54.
3. Certain charges for services subsequent to the former adjustment in 1820, 59,96.

Making in all the sum of 655,08.

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And he has given a credit of

309.00.

Leaving a balance of  
which was allowed.

\$346.08.

The appellants object,

1. To the allowance of interest on the former balance of \$332.58, upon the ground that an administrator, is not in any case to be allowed interest on a balance due to him from the estate. But we are unable to perceive any good reason for denying interest in such a case, when from the circumstances of the case, it is equitable. It is certainly immaterial, whether interest be paid to the administrator or the creditors of an estate. Cases may and do occur, where it becomes necessary for the administrator to advance money, to prevent a sacrifice of property; and where this is done, and the interest of the estate promoted thereby, no possible reason can be assigned why the administrator should not receive interest. The only ground upon which it can be refused, is an unreasonable and unnecessary delay on the part of the administrator, in converting the effects into money, to the prejudice of the estate. When such is the case, there is a very satisfactory reason for not charging an estate with the accumulation of interest. In this case, it appears that the balance was, or at least might have been, ascertained in January 1824, the period when the last credits were made, and when the administration appears to have been closed, except so far as this proceeding is concerned, which has for its object merely the satisfaction of the balance due the administrator, by means of a sale of real estate. It appears that certain sums due the estate were not realized until January 1824. Up to this time, the administrator might reasonable delay, in expectation of receiving those sums in satisfaction of his debt, and his suffering his claim to rest, with this view, in preference to resorting to a sale of real estate, was probably for the advantage of the estate, and ought not to prejudice his claim for interest. We therefore allow the interest on the balance due in January 1820 to January 1824. But from this period down to February 1832, when this proceeding was instituted, there appears to have been no steps taken by the administrator to recover this balance, nor indeed any means of satisfying it, except by sale, a sale of real estate. Why the administrator did not apply for an order of sale, during this period of eight years, or why he should have slept upon his claim until February 1832, when he petitioned for a sale of real estate, we are not informed. In the absence then, of all excuse for this de-

lay, we are bound to consider it as unnecessary and unreasonable, and as tending to the prejudice of the estate, by an unnecessary accumulation of interest. We therefore allow no interest for this period. But from February 1832, when measures were taken to recover the balance, to the present time, during which period the collection has been delayed by the resistance of the heirs, interest is allowed.

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The next objection is to the claim for services rendered subsequent to the settlement of 1820, upon the ground, that the object and purpose of these services was merely to realize a balance supposed by the administrator to be due to himself, and that he ought not to charge the estate, for services rendered, in merely prosecuting a claim of his own.

This claim depends, in a great measure, upon the result of the accounting. If the administrator has pursued a groundless claim, it is very clear that he ought not to charge his services upon the estate. But if, on the other hand, the claim be well founded, and he has been prevented from closing his trust by the groundless opposition of those interested in the estate, we consider his services, in bringing the matter to a close, as necessary and proper, and that he is entitled to reasonable compensation. We therefore allow the claims of the administrator, with the correction in the particular of interest, as mentioned above.

We come now to the claims of the heirs upon the administrator.

These are,

1. A claim for sundry dues to the estate, from sundry persons, claimed to have been received by said administrator and never credited, \$48,99.
2. A claim for the amount of \$138,16, paid to said administrator by one Kimball, under the circumstances heretofore mentioned, 138,16.
3. The sum of \$83,16, as an error in the former settlement, 83,16.

With respect to the first of these claims, it may be disposed of at once, upon the ground that the commissioners have found, that in point of fact, these sums were never received by the administrator.

To the two remaining claims it is objected,

1. That they are not properly before us for adjudication, and
2. That the subject is concluded by the decree of the probate court in January 1820.

These items, it is argued, were not presented to the probate court, upon the occasion of the adjustment of the administrator's

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account, and the decree from which this appeal is taken, and can not, it is insisted, be considered here.

The question then is, what is involved in this appeal? *Prima facie* the whole account. The appeal has reference to the result of the adjustment below, and brings before this court every thing which is involved in that enquiry. The adjudication below is, that a certain balance is due to the administrator. The correctness of this adjudication is to be tested by an examination of the whole account, and the appeal, from its very nature, brings the whole subject before this court, to be decided, not upon the precise evidence there exhibited, but upon any and every consideration which is legally pertinent to the issue. We are not restricted by the decision of the probate court, nor the evidence there exhibited; but, as in all other cases of appeal, we are to proceed to a trial *de novo*, upon the same principles, and in the same mode, as if no adjudication has been had upon the subject; and the party has the same right as he originally had to rely upon any consideration, either of law or fact, which he may deem proper, with this only restriction, that it be pertinent to the issue.

This being the case, we can not separate the account or reject any claim which may have a bearing upon the result; and if the claims here made, are well founded in themselves, it is no valid objection to them, that they were not in fact presented to the probate court.

The next objection is, that these claims are concluded by the adjustment and the decree of the probate court in January 1820.

The claim for \$138,16, arises in this way. It appears that the intestate Smith was treasurer of the town of Royalton, and upon his decease, a claim in behalf of said town was presented to the commissioners on his estate, and allowed at the sum of \$309,47; it being a balance of certain taxes supposed to have been received by him as treasurer. In truth however, a part of these taxes have never been collected, but were afterwards collected by the collector and paid into the treasury, and thus satisfied to the amount of \$138,16, the claim thus allowed to the town against the estate of said Smith. Yet upon the settlement in 1820, the administrator was allowed for the whole sum of \$309,47, as having been paid by him, without any deduction for said sum of \$138,16, thus paid by the collector.

The other claim for \$83,16 is, in substance, a claim for an over-credit to the administrator in that settlement. It is alleged that a certain claim, allowed and reported by the commissioners at \$84 dollars, was in fact but 84 cents; and, although stated in the



commissioners return at \$84 dollars, was paid by the administrator at 84 cents and no more ; and that it was entered in the commissioners report : the larger sum by mistake, and in consequence was allowed in the settlement to the administrator at a larger sum than 84 cents by a difference of \$83,16.

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Upon this statement the question arises, whether these claims are barred by the adjustment in 1820. It should be remarked, that the sum of \$133,16, mentioned above, was paid in to the town treasury in the year 1816, and some years before the former settlement ; so that these facts might then have been taken advantage of to reduce the credit due to the administrator for the payment of the claim allowed to the town.

It is a general rule, that the decision of a court of competent jurisdiction, unappealed from and not reversed, is conclusive between all parties to the proceeding, upon the subject matter of the adjudication. And this rule holds, as well in reference to the decrees of probate court, as those of any other.

The great difficulty on this point has been to determine, how far the decision of that court is conclusive as to the result, or whether it is conclusive, only as to the precise matter adjudicated upon. Thus, in this case, the question may be asked, whether the decree of the probate court in 1820 is conclusive evidence, that the estate was indebted to the administrator in the sums there stated, or is it conclusive only, as the particular items of account, which appear from the record to have been in fact considered and adjudicated upon.

This question has arisen in two ways. In the first place, it has arisen, in a proceeding in another court. As in case of a suit in the common law courts, upon an administrator's bond, alleging, as a breach, his not having accounted for effects supposed to have come to his hands, and it appears that he has adjusted his account in the probate court, and obtained a decree for a specific balance. The question in such case arises, whether such decree is a bar to the suit. Such a case arose in Rutland county recently, and it was *held*, that the decree was not conclusive as to the result, but conclusive only of the matters, which appeared of record to have been adjudicated upon—and that, if the administrator had received money &c., for which, through fraud, accident or mistake, he had not accounted, and upon which the probate court had not in fact adjudicated, it might be recovered by suit on his bond, the decree of the probate court notwithstanding. For myself, I should have been as well satisfied had the decision been otherwise—and

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had it been *held*, that the decree was conclusive, as to the ultimate balance, so long as it remained in force, like the adjudication of a court of law in the action of account. This would have driven the prosecutor into the probate court, and secured to that court the exclusive jurisdiction, in the first instance, over this subject of accounting, where I think it properly belongs.

Another way in which the question arises, is in a subsequent proceeding in the probate court; and here the question is, how far is that court bound by its previous adjudications.

On the one hand, it seems necessary to treat such previous adjudication, as conclusive to a certain extent, otherwise the proceeding would be nugatory. It will not answer to *hold*, that every thing connected with the settlement of an estate is, of course, open to litigation, so long as any cognizance can be taken by that court, of the concerns of the same estate.

On the other hand, it is indispensable to the purposes of justice, that the probate court, like every other court of extensive jurisdiction, should possess the power, to a certain extent, of revising and correcting its own proceedings.

This object is effected in the common law courts, by writ of error, petition for new trial, &c. But those proceedings being unknown in the probate court, there seems to be no other mode of attaining the object, but to concede to it the power of acting in a summary way, upon due application for that purpose. So long, however as the decree remains in force, it is equally conclusive upon that court, as upon other courts when drawn in question elsewhere. It is conclusive upon all matters actually adjudicated upon, but not as to matters not presented nor considered. This rule is analogous to that which obtains elsewhere. A judgment of this court is conclusive so long as it remains in force, notwithstanding the power of the court to grant a new trial. The only mode of assailing it or evading its conclusive effect, is through the direct action of the court upon it, in some mode allowed by law, for the purpose of annulling or reversing it.

So it is with the probate court. Its own sentence or decree is conclusive upon it, to the extent already mentioned, until by some proper application its action is called directly to annulling or correcting its decree.

To apply these principles to the present case. The decree of the court made, upon the adjustment of the administrators account in January 1820, is still in force. The claims in question were directly and specially acted upon on that occasion. The pay-

ments were, in both instances, allowed to the administrator, and the effect of the evidence, in this case is merely to shew, that the decision was wrong, and that the credit given to the administrator, on that occasion, should have been for a less sum. Had the payment of the 136 dollars been subsequent to that decision, the case would be different, but having been previous, it furnished matter of defence to the administrator's claims, and not having been set up, the parties are concluded by that decree, so long as it remains in force.

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Admitting the power of the probate court to overhaul the decision, still it is not competent for us to do so, on this occasion. The subject is not properly before us. This proceeding originates in an application, on the part of the administrator, to settle an account accruing subsequent to the settlement in 1820. He produced to the probate court two claims, which being allowed, the heirs take an appeal. In this court, they file objections to his claim, the subject is referred to commissioners, and then, in the first instance, the claims of the appellant are presented.

The proceeding appealed from was a mere supplemental proceeding. Nothing was before the probate court but such part of the administrator's account as had accrued since the former settlement; and although the appeal brought the subject before us precisely as it stood there, yet it brought with it no legitimate enquiry, as to the correctness of the former decision, because no such enquiry was involved in the proceeding below. It was already *res adjudicata*. We cannot now overhaul that decree, and we are not at liberty to *hold*, that an appeal from a mere supplemental accounting, involves an investigation of the justice or propriety of the anterior proceedings of that court. Before we can be called upon to make such an investigation, the subject must be brought before that court, its action obtained, and the subject brought here, by appeal from a direct determination upon the point.

We consider then, that the previous decree of the probate court adjudicating specifically upon the subject, the same being in full force, is conclusive upon the occasion; that no enquiry into the correctness of the decree was involved in the proceeding below, or brought hither by the appeal.

The item of \$84 dollars appears to have been allowed by the commissioners against the estate, and also allowed to the administrator by the probate court. The last allowance was in 1820, and the former as early probably as 1815. We are now called upon to overhaul and virtually reverse these allowances, after a lapse of

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fifteen or twenty years. Were the subject properly before us, we should hesitate to open to fresh litigation a subject which has been so long at rest.

There is, it must be admitted, a strong apparent equity in these claims in behalf of the heirs. But strong as it is, we cannot assume the responsibility of disregarding the most salutary and firmly established rules of law, and establishing a precedent of such dangerous tendency.

The order of sale is therefore affirmed, and the report of the commissioners, corrected upon the grounds here furnished, and judgment accordingly.

## ORANGE COUNTY,

FEBRUARY TERM, 1836.

PRESENT, HON. STEPHEN ROYCE,  
 " SAMUEL S. PHELPS,  
 " JACOB COLLAMER, } *Assistant Justices.*  
 " ISAAC F. REDFIELD,

## HANNAH CORLISS vs. GEORGE W. CORLISS.

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When two deeds of the same land are executed by A to B, at or near the same time, for the same consideration, and for the same purpose, of the same tenor, but of different dates, and before either deed is recorded, or any further conveyance made or lien created, B gives up to A the deed last executed, to be cancelled, the other deed is not operative between the parties, without some new agreement to give it effect,—something tantamount to a new delivery. But if A takes away and destroys said last executed deed, without the consent or authority of B, the other deed shall be allowed to take effect, and be recorded.

Notice of an unrecorded deed is equivalent, as against those having such notice, to a record of the deed.

When a division is ordered by a court of probate between the estate of a testator or intestate, and the real estate of another person, in pursuance of the 84th section of the probate act of A. D. 1821, if the committee appointed to make such division give the notice to such person, which is required by that section, and afterwards proceed to make the division, their report, when accepted by said court, if no appeal is taken, becomes binding and conclusive upon such person, though the previous notice required by the second proviso to that section be omitted.

Ejectment for ten acres of land in Bradford, claimed by the plaintiff as dower in the estate of Jacob Corliss, her late husband.—  
*Plea, the general issue.*

The cause was submitted to the jury on the following testimony:

It was conceded that both parties derived title and claimed under Emerson Corliss.

The plaintiff, in support of the issue on her part, read to the jury a deed from Emerson Corliss to her late husband, Jacob Corliss, dated December 11th, 1828, acknowledged the same day, and re-

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corded the 19th of May, 1831, conveying to said Jacob Corliss one half of the farm in Bradford, on which the said Emerson Corliss then lived, including the land in dispute. She also proved the defendant in possession.

In further support of said issue on the part of the plaintiff, she offered to read in evidence to the jury, a copy of the records of the probate court, for the district of Bradford, of the assignment of the land in dispute, to her as her dower,—a copy of the records of the prior proceedings of said court, and the original warrant to the committee of division.—To the admission of all which, the defendant objected, and offered to prove by the judge of probate and register, that before the issuing of the order of division and assignment of dower, no notice in fact was ever given to the defendant, or any others interested in said division.

It was conceded that the defendant then owned one undivided half of said farm, and that he was then in actual possession of the same. Which evidence of the judge and register aforesaid, was rejected by the court, and the objection to the probate records and proceedings overruled, and said records admitted.—To which rejection and admission, the defendant excepted.

The defendant, in support of the issue on his part, read in evidence to the jury a deed duly executed, from Emerson Corliss to himself, dated May 13th, 1826, acknowledged on the 14th of the same month, and recorded on the 16th of the same month, conveying the undivided half of said farm.

The defendant then read in evidence to the jury another deed from Emerson Corliss to himself, of one undivided half of the farm said Emerson Corliss then lived on, dated April 6th, 1831, acknowledged the same day, and recorded the 9th of April, A. D. 1831, duly executed, and including the land in question.

The defendant, in farther support of said issue on his part, adduced evidence tending to prove, that said Emerson Corliss was, on the execution of his deed to defendant, the 6th of April, 1831, and for more than twenty years before had been, in actual possession of the premises.

The defendant, in farther support of the issue on his part, read in evidence to the jury, a mortgage deed of said premises, from himself to the said Emerson Corliss, dated April 6th, 1831, acknowledged the same day, and recorded April 6th, 1831, conditioned as follows:

“Provided nevertheless, and the condition of this deed is such, that if the said Geo. W. Corliss shall well and truly pay or cause

to be paid at the decease of the said Emerson Corliss and his wife Mehitabel Corliss, the following sums, to wit: twenty-five dollars to Mehitabel Corliss, fifty dollars to Harriet B. Powers, and twenty-five dollars to Milo Jackson Corliss, son of said Geo. W. Corliss, which sums are to be paid in good saleable neat stock, and that said Emerson Corliss shall have possession of the above premises during his natural life, then, and in that case, this deed to be null and void—otherwise, to be and remain in full force and virtue.”

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The plaintiff, in farther support of the issue on her part, introduced evidence tending to prove, that on the 11th of December, A. D. 1828, the deed from Emerson Corliss of that date was executed, acknowledged, and delivered to said Jacob Corliss; and that soon after, (the same or next day,) another deed of precisely the same tenor, but dated May 13th, A. D. 1826, was duly executed by said Emerson Corliss to the said Jacob, for the purpose of enabling the said Emerson Corliss to procure a pension, as a revolutionary soldier; and also, testimony tending to prove, that the defendant had notice of the existence of both these deeds, at or about the time they were executed, and at other times, before he received his deed. That the said Jacob, in two instances, offered to mortgage the lands deeded him by Emerson Corliss, to secure debts he was owing; but no mortgage was given. No evidence was given tending to prove that these offers to mortgage were known to the defendant, or Emerson Corliss. The plaintiff also, to explain the fact of the premises being suffered to remain in said Emerson's possession, and said deeds unrecorded—offered evidence tending to prove, that just before the deed under which plaintiff claimed was recorded, the plaintiff got the witness to inquire of Emerson Corliss if he could give the \$200, as had been talked of. Witness had understood they were offended at the said Emerson's taking the deed, and he was to give \$200 for so doing;—when the said Emerson telling the witness to mind his own business, the said administratrix soon after caused the said deed to be recorded, and the premises to be appraised and inventoried.

The defendant introduced evidence tending to prove, that both of the aforesaid deeds from Emerson Corliss to Jacob Corliss were made on the same consideration, at or near the same time, for the same purpose, and on the same trust, and so understood between the parties: that after the deed of 1828 was made, something was said about altering the date of it to 1826; but it was thought best to make a new deed, and date it in 1826, and a new one was made, and that this was done the better to enable the said Emerson Cor-

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liss to get his pension ; and that Jacob Corliss, in his life-time, never took possession of said land, under said deeds, or claimed to own the same ; and that the plaintiff, who was administratrix on the estate of the said Jacob, did not inventory said land as belonging to the estate of the said Jacob, or take any notice of said land, as a part of the said Jacob's estate : That when the plaintiff presented her final account as administratrix for settlement, which was about the 19th of May, A. D. 1831, she procured said deed from Emerson Corliss to Jacob Corliss recorded : That Jacob Corliss died with a lingering disease, in October, 1830 : That in June, A. D. 1830, Jacob Corliss, then being confined to his house, with the disease with which he died, gave up to Emerson Corliss the deed dated 13th May, A. D. 1826, to be cancelled, and it was cancelled ; and the said George W. Corliss saw it in the said Emerson's possession, immediately after it was taken up, and saw it burned ; he, the said Emerson, still remaining in possession of the premises, on the 6th day of April, A. D. 1831, executed the deed before mentioned to the defendant.

The plaintiff also introduced evidence tending to prove, that the said Emerson fraudulently obtained the said deed of May 1826, from the wife of said Jacob, and carried it off and destroyed it, without consent of the said Jacob's wife, and without the consent or knowledge of the said Jacob.

Whereupon, the counsel for the defendant requested the court to charge the jury, first, that if they believed that the two deeds, to wit, the deeds from Emerson Corliss to Jacob Corliss, one dated May 1826, and the other in December, 1828, were executed upon the same consideration, and for the same purpose, and upon the same trust, and so understood between the parties, the giving up of the deed of 1826, by Jacob Corliss to Emerson Corliss, to be cancelled, placed the title of the land in question in Emerson Corliss ; and that the deed of 1828, remaining in Jacob's possession, was a mere nullity, and cannot be used to support the plaintiff's title : Secondly, that if the jury find that the said George W. Corliss had notice of the deeds to Jacob Corliss, about the time they were executed, still he is entitled to recover in this case, if the jury find that said Jacob Corliss did not in his life-time record his said deed or deeds, or take possession of said land, or claim title to the same ; and that the said Hannah, as administratrix on his estate, did not inventory said land, or claim the same as belonging to said estate, until after the defendant's deed was executed, delivered and recorded : Thirdly, that from the length of time the deeds



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to Jacob Corliss remained unrecorded, connected with the fact that no possession of the land was taken, or claimed by virtue of said deeds, the defendant might well presume either that they had been cancelled, or that the estate had been re-conveyed, or, that for some cause, they were invalid, and so understood by the parties: Fourthly, If the jury find that the defendant had notice of the execution of the two deeds to Jacob Corliss, when he took his deed, and notice also that they were given for the same consideration, and for the same purpose, and upon the same trust, and that the deed of 1826 had been by the said Jacob given up to be cancelled, before he took his deed, he is entitled to recover in this suit. And if he had notice of only one deed, and knew that that had been given up to be cancelled, before he took his deed, he is entitled to recover.

Whereupon, the court charged the jury as *first* requested by the counsel for the defendant, but refused to charge as *secondly*, *thirdly* and *fourthly* requested; but did give in charge, among other things, the following, viz: As the defendant has the eldest record title, the jury will first inquire whether defendant had notice of the existence of the plaintiff's deed of December 11, 1828, before he took his deed of April 6th, 1831: If the jury are not satisfied that defendant had such notice, the defendant will be entitled to a verdict: If the jury are satisfied that the defendant had such notice, their next inquiry would be, whether the deed of May 13th, 1836, from Emerson Corliss to Jacob Corliss, was given up to be cancelled, by Jacob Corliss, or by his authority; If the jury find it was not so delivered up, then the plaintiff will be entitled to recover, if the jury also find that defendant had notice of said deed of December 11th, 1828; but if the jury find that said deed of May 13th, 1826, was given up to be cancelled, as aforesaid, then it will be necessary for them to inquire whether both deeds, that is, the deed of May 13th, 1826, and that of December 11th, 1828, were given for the same cause, and with the same intent; and if the jury find that they were so given, then the giving up of one of said deeds to be cancelled, would, in law, render the other invalid, unless the jury find that it was the intention of the parties that the one retained and not given up, should be and remain operative and valid; but the giving up one to be cancelled, unexplained, would render the other void.

With respect to the said Jacob's deeds remaining so long unrecorded, and the said Emerson's continuing in possession of the premises, the court gave in charge to the jury, that these facts did

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not, in point of law, render said deeds invalid ; but that they were proper to be considered by the jury, together with the other evidence in the case, with the view of ascertaining whether said deeds were originally void, or whether, if originally valid, they were afterwards given up to be cancelled.

The counsel for defendant excepts to said charge, and to the neglect of the court to charge as requested ; and to the admission and rejection of the testimony before mentioned.

The proceedings of the probate court, which relate to the setting out of dower to the plaintiff, are as follows :

"In Probate Court, holden at Bradford in said District, on the last Tuesday, being the 31st day of May, A. D. 1831—Hannah Corliss, Administratrix on the Estate of Jacob Corliss, late of Bradford, deceased, makes return of the following additional inventory of the estate of said deceased, viz :

"To the Honorable the Court of Probate for the District of Bradford—Hannah Corliss, Administratrix on the Estate of Jacob Corliss, late of Bradford, deceased, represents, That since the return made to this Court by the Committee of Appraisal of the Inventory of the Estate of said deceased, she has discovered the following described Real Estate, belonging to said deceased, not embraced in the Inventory of the Committee, which she now returns to said Court as belonging to said Estate, viz :—Being the same land deeded by Emerson Corliss, by his deed dated the 11th day of December, A. D. 1828, being an undivided moiety or half of about sixty acres of land, on which Emerson Corliss and George W. Corliss now live, in said Bradford. \$450 00

"HANNAH CORLISS, *Administratrix*.

"May 31, 1831.

"Which said return of inventory is accepted and ordered to be recorded.  
SIMEON SHORT, *Register*."

"And in Probate Court, holden as aforesaid at Bradford in said District, on the 31st day of May, A. D. 1831—Hannah Corliss, widow of Jacob Corliss, late of said Bradford, deceased, makes application for Dower to be set off to her, out of the Real Estate of her late husband : And it is ordered by said Court, that Dower be set off to her out of said Estate ; and thereupon, Geo. W. Prichard and Andrew B. Peters, Esqs., of said Bradford, are appointed a Committee for that purpose, and a warrant in due form of law issued to them."

"STATE OF VERMONT, } The Hon. William Spencer, Judge of  
Bradford District ss. } the Probate of Wills, &c. in said District.  
To Andrew B. Peters and George W. Prichard, Esqs., of Bradford in said District, all Freeholders—GREETING.

"Pursuant to the power and authority to me given, in and by the laws of the State aforesaid, I do hereby appoint and authorize you

a Committee to appraise all the Real Estate whereof Jacob Corliss, late of Bradford aforesaid, &c. deceased, died seized and possessed in said estate, each piece and parcel by itself, at the present true value thereof in lawful money, all in words at length: and if said estate, or any part thereof, be in common, or undivided with the real estate of any other person, you are first to sever and divide the estate of said intestate from the estate with which it lies in common as aforesaid, giving timely notice to all persons interested, to be present if they see cause. When you have perfected your inventory, you are to set off to Hannah Corliss, the said deceased's widow, one full third part of the said estate (so as may be convenient for her) for her dower or thirds, during her natural life; and what you so set off, you are to describe, by plain and lasting metes and bounds, that so confusion may be prevented upon the reversion of the dower. You are to be under oath faithfully to perform this service; and when you have performed the same, you are to make return of this warrant, with your doings thereon, into the Probate Office for the District aforesaid, as soon as may be.

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"Given under my hand and seal of office, at Bradford, in the District of Bradford, this 31st day of May, A. D. 1831.

"By order of the Judge, SIMEON SHORT, *Register.*"

"STATE OF VERMONT, } *Bradford, October 3d, A. D. 1831.*

*Orange County ss.* } The above named Andrew B. Peters and George W. Prichard personally appeared, and made oath that they would faithfully perform the services assigned them by the foregoing warrant.

"Before me,

JOHN M'DUFFIE,

*"Justice of the Peace."*

"And in Probate Court, holden at Vershire in said District, on the last Tuesday, being the 25th day of October, A. D. 1831—The Committee heretofore appointed to set off Dower to the widow Hannah Corliss, of Bradford, in said District, out of the Real Estate of her late husband, Jacob Corliss, deceased, make their return, which being accompanied with their warrant, and a certificate of their being duly sworn according to law, is accepted and ordered to be recorded, and is as follows, viz:

"Pursuant to a warrant to us directed by the Hon. the Probate Court for the District of Bradford, we, the subscribers, having been sworn agreeably to the directions of the said warrant, did attend to the duties of our appointment, on Monday, the third day of October, and were shown the farm now in the occupancy of George W. Corliss, and were shown a deed of one half of said farm from Emerson Corliss to Jacob Corliss. We did, on said day, notify said George W. Corliss that we were directed to set off one half of said farm to the estate of said Jacob Corliss, and were by him forbid to enter the premises. We then did appraise the one half of said farm at three hundred seventy-five dollars, and did divide it as follows, to wit: Set off to the estate of Jacob Corliss, twenty-

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one acres of land, on the west side of said farm, and is all of said farm west of a line, beginning, &c. We set off to Geo. W. Corliss thirty acres, as may be seen in the plan as surveyed by J. M<sup>d</sup>. Duffie, Esq., and is annexed. We also set off ten acres on the east side of said farm, as follows:—To Hannah Corliss, the widow of Jacob Corliss, for her dower or third thereof, amounting to the sum of one hundred and twenty-five dollars.

“Dated at Bradford, October 3d, 1831.

“ANDREW B. PETERS, }  
“GEO. W. PRICHARD, } *Committee.*

“A true record, Attest, SIMEON SHORT, *Register.*”

Verdict and judgment having passed for the plaintiff, and the defendant's exceptions having been duly certified and allowed, the the cause was removed into this court.

*Upham for the defendant.*—The first question in this case arises upon the decision of the county court in admitting in evidence a copy of the records of the probate court for the district of Bradford. This copy of record, we insist, was improperly admitted in evidence to support the issue on the part of the plaintiff.

It is a well-settled rule, and one founded upon the first principles of natural justice, that no proceedings should be had affecting the life, liberty or prosperity of an individual, who has not had notice of such proceedings, and an opportunity to defend himself.—2 Stark. Ev. 977.

The defendant, in this case, complains that proceedings have been had affecting his property, of which he has had no notice; and that such proceedings were admitted in evidence against him upon the trial of this cause in the court below.

The 84th section of the probate act declares, in substance, that when any real estate that is to be assigned to any widow for dower, shall be in common, and undivided with the real estate of any other person, the probate court may order the committee to make such division, to sever and divide the testator's or intestate's estate from the estate with which it lies in common; and such committee shall give timely notice to all persons interested, to be present if they see cause: And such divisions so made and accepted by said court, shall be binding upon all parties. Then comes the following *proviso*, viz: “That before such order shall issue, it shall be shown to such court, that all persons interested, or their attorneys within this state, have been notified of the application for such order.—Stat. 351.

Now it appears from the bill of exceptions, that the order of the

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probate court for the division of the real estate in question, issued without any previous notice whatever. And for this reason, the whole record should have been excluded as improper evidence in the case.—*French vs. Hoyt*, 6 N. H. Rep. 370—*Rathbun vs. Miller*, 6 John. R. 281—*vs. Neilson*, 3 John. R. 474.

In the case of the heirs of *Moses Robinson*, (1 D. Chip. Rep. 357,) the court set aside a decree of the judge of probate, ordering a distribution of certain real estate among the heirs, and also the decree of the judge approving of the said distribution and division, because the heirs to said estate were not notified to appear before the judge and show cause,\* if any they had, why such order of distribution should not be made. The statute under which the judge proceeded in making the order of distribution in the case last cited, did not direct notice to be given before making the order.—*Smith vs. Rice*, 11 Mass. R. 507—*Clapp vs. Beardsley*, 1 Aik. R. 168—14 Mass. R. 222.

In the case of *Sally Downing*, decided by this court, in this county, in 1832, a decree of the probate court, assigning her personal property out of her deceased husband's estate, was set aside because it was made without notice to the heirs. The statute requires no notice before the assignment of personal property to a widow. Yet the court ruled, upon general principles, that it was necessary. If the doctrine of the cases cited is sound, a new trial should be granted in this case upon the ground that illegal evidence was admitted in the court below.

Again : We say the record of the probate court should have been excluded, because it did not show a legal division of the real estate in question. It appears from the report, that the plaintiff's dower was not taken from that portion of the land set off to the estate of Jacob Corliss.—*Vide* record of division.

The county court refused to charge the jury as requested by the defendant, and in this we insist there was no error. We were entitled to a charge according to our second request.

Surely, if Jacob Corliss neglected, for the two years he lived after the execution and delivery of the deeds in question, to procure either of them recorded, or to take possession of the land conveyed, or to claim title thereto by virtue of the aforesaid deeds, and his widow, who was administratrix on his estate, neglected to inventory said land, or claim the same as part of her deceased husband's estate, the defendant might safely conclude that the deeds were invalid for some cause, and purchase the land from his father, Em-

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erson Corliss, and held against the plaintiff, notwithstanding she subsequently procured the deed to her husband to be recorded.—*Vide Farnsworth vs. Childs*, 4 Mass. R. 637—*Priest vs. Rice*, 1 Pick. R. 164—*Wendall vs. Van Rensselaer*, 1 John. Chan. R. 344—*Croft vs. Townsend, Adm'r*, 3 Desau. 225, 230—*Amer. Chan. Dig.* 216, 36 No.—*Jackson vs. Givens et al.* 8 John. R. 137—*McMechan vs. Griffing*, 3 Pick. R. 149—*Cushing vs. Hurd*, 4 Pick. R. 253.

The doctrine of the court in *Farnsworth vs. Childs*, fully supports the position we have taken in this case. In that case, John Farnsworth deeded the premises to Isaac Farnsworth, on the 11th of June, 1805. The deed was not recorded until October, 1807. James Brazer, who two years afterwards attached the premises as John Farnsworth's property, knew of the execution of the deed, and actually read it, and on the 13th of June, 1805, being a magistrate, took the acknowledgement of it. In June, 1807, John Farnsworth still remaining in possession and occupying the premises, but for Isaac's use, James Brazer and his partner extended an execution on the premises as the property of John Farnsworth, and took possession under their levy. Isaac Farnsworth then brought his action of trespass against Childs, who cut the hay as servant of James Brazer and partner. Ch. J. Parsons, in delivering the opinion of the court, said, "We are willing to construe the words of the statute liberally, to guard against fraud, but not to the injury of a second purchaser. If the grantee had entered into possession, the notice of the prior conveyance must have been considered as a continuing notice. But where the grantor remains in possession for a long time, during which the grantee might have recorded his deed, but does not do it, it would be unreasonable to defeat the subsequent title of a judgment creditor by imputing to him fraud; because he might well presume from the length of time that the deed had remained unrecorded, either that it was not *bona fide*, or that it had been *cancelled*, or that the estate had been *re-conveyed*; and if the first purchaser suffers, it is owing to his own neglect."

This doctrine, we consider to be sound. And in our *third* request to the county court to charge, we desired the judge so to declare it to the jury; but he refused.

Our *fourth* request to charge, was also passed over by the county court, without notice.

We now insist that if the defendant had notice of the two deeds from Emerson Corliss to Jacob Corliss, at, or near the time of their

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execution, and also notice that they were given for the same consideration, and for the same purpose, and upon the same trust, and personal knowledge that the deed dated in 1826 had been given up to be cancelled, before he took his deed, he is entitled to recovery in this action; and the jury, in the court below, should have been so instructed.

*Nutting for the plaintiff.*—Defendant's first exception is to the decision of the court, admitting the probate records containing no evidence of *notice to defendant of application* for an order of severance.

This decision of the court ought to be sustained for the following reasons, viz:

The *proviso* of the statute, on which the objection is taken, is merely *directory*; and compliance with a directory statute is not a *sine qua non*.—*Vid.* Stat. p. 350—*Hale vs. McLaughlin*, Bray. R. 219, Stat. 207—Marriage Act, Stat. p. 261.

Duty of courts to distinguish between those parts of a statute which constitute its *essence*, and those merely directory.—1 Swift's Dig. 13.

No possible benefit could accrue to the defendant from being notified of the *application* for an *order*. (The court will observe it is "*application* for such *order*," not application for the appointment of commissioners.)

Defendant could not resist it. The court *must* make the order.—(Stat. p. 350.) *May* means *shall*.—(1 Sw. Dig. 13.) Nor could he have a voice in appointing the commissioners. They are appointed by the court before the *application* for the order of severance.—Stat. p. 350.

A compliance with this *proviso* of the statute would necessarily require some such process as this, viz:

The widow applies for dower.

The court appoint commissioners to set it off.

Those commissioners discover that the estate lies in common with that of some other person.

Those commissioners, or some one else, makes *application* for an *order* of severance.

Those commissioners, or some one else, gives *notice* of such *application* to all interested.

On this notice being shown to the court, no matter how, *order* of severance is made.

The commissioners again give *notice*, and proceed to sever and set off the dower.

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Was this process ever adopted? Was it ever thought of? What possible benefit could result from its adoption?

No notice is required by our statute, of the application for an order of severance between heirs or legatees, nor between a widow and heirs or legatees—(Stat. p. 349 and 350.) Why should it be in this?

It will be said the supreme court once decided that such notice was necessary.—D. Chip. R. p. 357.

"A hasty decision, whether reported or not, if it will not bear examination, and leads to great and manifest inconveniencies, may be *overruled*."—4 Vt. R. 433.

This decision of the court ought to be sustained for this, viz:—Such has been the practice ever since the passing of this act: and "*a long uninterrupted practice under a statute, is evidence of its construction*."—4 Vt. R. 428, *Skinner et al. vs. Watson et al.*—Aik. Forms, 345—4 Vt. R. 450.

"The probate court having jurisdiction of the subject matter, the issuing of the order must be considered to have been on regular previous proceedings."—*Collard vs. Crane*, Brayt. 19—*Smith, Adm'r, vs. Burnham et al.*, 1 Aik. 93—*Leverett vs. Harris*, 7 Mass. R. 296.

This statute does not direct *what notice*, nor how it shall be shown to the probate court.

The decree of the probate court ratifying this severance, is a judgment of a court having *competent jurisdiction*, and therefore is conclusive till reversed or annulled.—1 Swift, 752—3—4.

In *Sheldon vs. Bush*, (1 Day, 170,) the court decided that "a decree of a probate court is conclusive till disaffirmed on appeal, or set aside in due course of law, and cannot be inquired into collaterally."—3 Dane, 523.

This defendant was a party to this judgment or decree of the probate court. He was duly notified by the commissioners.—*Vide* Probate Records.

If he was dissatisfied with the decree, he should have appealed: otherwise, the decree is conclusive against him.—Stat. p. 333—4 Vt. R. 620.

If he was not notified, he might have brought *Audita Quærela*.  
*What benefit would result from excluding this record?*

Defendant's second exception, that the court excluded parol evidence—that no notice of application for an *order* of severance was given to defendant. This evidence was not offered to the jury on



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the merits, but to the court on the admission of the probate record ; therefore, no cause for setting aside the verdict. It was properly rejected on several grounds.

1. Notice not necessary.

2. The judgment of the probate court unappealed from, could not be attacked collaterally.

3. The evidence offered was of such a nature that the court saw that the witness could not testify.

4. The evidence offered was to *negative* a fact which had not been *averred* nor attempted to be *proved* : therefore, *impertinent*.

Defendant's third exception is to the charge of the court, and the neglect of the court to charge as he had requested. Defendant first complains that the court neglected to charge, that plaintiff's neglect to record the deed and take possession of the land, from December 11th, 1828, to April 6th, 1831, was *per se* sufficient to entitle him to a verdict, and this, as matter of law, independent of any explanation which was or could be made !

Evidence to explain these facts, in this case, Jacob's offer to mortgage the land—His *sickness* and *death*.

Emerson Corliss' proposals to re-purchase of administratrix.

These facts were proper to go to the jury as evidence of fraud ; and so the court charged.

Defendant's third request to the court—same in substance as the second, and already answered.

Defendant's fourth request—same as his first, except the latter clause, viz : " If defendant had notice of only one deed, and knew that had been given up to be cancelled before he took his deed, he is entitled to recover." The court so charged in substance and effect.

Defendant contended and proved, that he knew of the deed of May 1826, and saw it burnt ; and the court twice expressly charged the jury that unless they find that defendant had notice of the deed of December 1828, they must find for the defendant.

The opinion of the court was delivered by

ROYCE, J.—The case involves two principal inquiries :—1st, Whether the premises sued for were part of the estate of Jacob Corliss, deceased :—2, Whether they were legally set out to the plaintiff, as dower in that estate.

The first question depends on the deed from Emerson Corliss to the said Jacob Corliss, dated December 11th, A. D. 1828. If that deed was valid and operative between the parties to it, and

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likewise with reference to the defendant, it made a good title in the estate of the grantee. The case discloses several circumstances calculated to excite suspicion as to the intended validity of the deed; such as the occasion on which it was executed, when the main object of the grantor appears to have been, to qualify himself for receiving a pension;—the absence of all proof showing a valuable consideration paid for the conveyance;—the continued possession and enjoyment of the land by the grantor;—the silence of Jacob Corliss as to this newly acquired estate, and his neglect to procure either of his deeds recorded. But it also appears, that Jacob Corliss and the defendant were the two sons of the grantor, who had already deeded one half of his farm to the defendant, and yet retained possession;—that for most of the time, after the execution of said deeds, Jacob Corliss was in feeble and declining health; and that on a few occasions, he manifested a claim to the land, by offering to mortgage it. All these circumstances were proper for the consideration of the jury, when passing upon the original intention of the parties. And as they appear to have been correctly submitted with that view, the verdict has established the fact that an actual conveyance was intended. The jury were further instructed, (in pursuance of our decision in this cause on a former occasion,) that if the deed between the same parties, dated May 13th, A. D. 1826, was executed at, or soon after the time of executing that of December 11th, A. D. 1828, on the same consideration and trust, and for the same purpose; or, in other words, was intended as a substitute for it, the giving up of said deed of A. D. 1826 by Jacob Corliss, to be cancelled, would leave the other deed inoperative, without some new agreement to give it force and effect,—something tantamount to a new delivery of it. But that if Emerson Corliss obtained the deed of A. D. 1826 from the possession of Jacob Corliss without his authority or consent, the deed of A. D. 1828 should be treated as in force against Emerson Corliss, and against the defendant also, provided he had notice of its existence before receiving his deed from Emerson Corliss, dated April 6th, A. D. 1831. Under this charge the jury must have found, that Emerson Corliss possessed himself of the deed of A. D. 1826 wrongfully, or that there was an agreement to set up the deed of A. D. 1828. And as the case makes no mention of any evidence tending to show such agreement, the verdict must be taken to have established the other fact.

The deed of A. D. 1823, thus appearing to be operative as against Emerson Corliss, it remains to be considered with reference to the defendant. He seems to have had seasonable and repeated notice that such a deed existed; and the fact of notice is also conclusively implied in the verdict. But he contends that his deed of A. D. 1831 ought, under the circumstances, to prevail over the deed of A. D. 1828, though he acted with notice. It is insisted that the facts to which I have alluded, and especially the neglect of Jacob Corliss to take possession of the premises conveyed, or to place his deed upon record, furnished a presumption against the validity of his title, upon which the defendant, as a subsequent purchaser, had a right to rely. We have no rule of law which requires a deed to be recorded within any fixed period, or within what would be deemed a reasonable time in reference to other business transactions, to render it effectual as to those who have knowledge of its existence. Neither do we regard a change of possession, in the case of real estate, as legally essential to the safety of the grantee. Still, as great negligence in these respects may become the occasion of deception and injury, some principle of the kind contended for should doubtless be recognized, as a just qualification of that on which the plaintiff proceeds, that notice of an unrecorded deed is equivalent to a record of the deed. As one who purchases with knowledge of a previous conveyance to another is generally chargeable with fraud, so, on the other hand, to give effect to a deed which has long remained unrecorded, may sometimes operate as a fraud, even upon persons having notice of such deed. But since our law has not prescribed the time, nor defined the attending circumstances necessary to render these neglects of the grantee injurious and fraudulent, the court below were clearly justified in refusing to charge upon this point as requested by the defendant's counsel. The question was one of fraud and imposition in fact, and not of presumed or constructive fraud. Unless the conduct of Jacob Corliss was sufficient, under all existing circumstances, to create a reasonable and full belief in the defendant, that the deed of A. D. 1828 never took effect, or that the title under it had become extinguished, the facts embodied in the request could in no way operate to his advantage. And even then, as that deed is found to have been valid between the original parties, and as notice to the defendant was tantamount to a record of the deed, the effect of the evidence would be, rather to show a fraudulent and unjust use of a legal title by the plaintiff, than to invalidate the title itself. Under such circumstances, it is usual to resort to a court of equity, which is com-

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petent to set aside or restrain a legal title, when attempted to be enforced in violation of honesty and good faith. It is only in Massachusetts, and other states possessing no court of distinct and superior equity jurisdiction, that I find this particular species of defence sustained at law.

But the facts relied upon were by no means entitled to the influence claimed for them. There is no reason to believe, that the defendant's opinion was materially affected by the continued possession of Emerson Corliss, or by the omission of Jacob Corliss to record his deed. The time was quite too short to justify any fixed conclusion from either of those circumstances. On the contrary, as the defendant had seen the deed of A. D. 1826 in the hands of Emerson Corliss, and had witnessed its destruction, he was probably induced to purchase from mistaken apprehensions as to the manner of getting up that deed, or as to the legal effect of destroying it.

The question, whether the defendant should be regarded as a purchaser for valuable consideration, and as such entitled to impeach the deed of A. D. 1828, as a mere voluntary conveyance, has not been raised in argument, and will therefore be passed without comment.

The result is, that the title to the undivided half of the premises demanded, became perfect in the estate of Jacob Corliss.

The remaining questions in the case arise under the 84th section of the probate act of A. D. 1821.—It is there enacted, "That when any real estate, devised by will, or claimed by heirs, that is required to be divided among legatees, or heirs, or that is to be assigned to any widow for dower, shall be in common, and undivided with the real estate of any other person, the probate court may order the committee appointed to make such division, to sever and divide the testator's or intestate's estate from the estate with which it lies in common; and such committee shall give timely notice to all persons interested, to be present, if they see cause; and such division, so made and accepted by such court, shall be binding upon all parties." Then follows a proviso, directing guardians to be appointed for infants, persons *non-compos*, &c., and agents for persons out of the state, who are interested in either of the estates to be affected. And this is directed to be done before the division is made. The second proviso is as follows: "That before such order shall issue, it shall be shown to such court, that all persons interested, or their attorneys within this state, have been notified of the application for such order."

It is contended, as one ground for impeaching the probate pro-

ceedings, that a full division between the estate of Jacob Corliss and the defendant was not made, and that the land in question does not appear to have been set to the estate. But we think the report of the committee, rightly construed, furnishes an answer to this objection. That they considered themselves required to make a division of the whole farm, appears very clearly from their notice to the defendant. They commenced by setting off to the defendant thirty acres, being one half of the entire tract to be divided, and then severed to the estate of Jacob Corliss another tract of twenty acres. It is true, that the remaining ten acres are not in terms set to the estate; but they are set to the plaintiff, as the widow of Jacob Corliss, to be held by her as dower. This conclusively shows that they treated the ten acres as severed from the defendant's land, and as part of the estate of Jacob Corliss.

A more important objection arises under the second proviso, above recited. The defendant has a right to allege, that the warrant to the committee was issued without the notice contemplated in that provision. It was apparent to the probate court that dower was to be taken in this form, and that the defendant or Emerson Corliss had an undivided estate in the farm. And though, in terms, the plaintiff's application was merely for dower, and not for a division between the estate and third persons, yet such a division was manifestly necessary, to effect the object of her application. In substance, therefore, it was an application as well for a division with the defendant, as for the setting out of dower. It was a case, in short, within the obvious meaning of that enactment.

The requirement of this preliminary notice was intended to secure to those whose interests were to be affected, an opportunity to appear and be heard in the probate court, as to the legality and expediency of the division, and as to the fitness of the committee. And as this privilege may often be of great benefit, I am not disposed to treat the requirement as merely directory. Nor is the difficulty removed, by simply insisting on the jurisdiction of the probate court over the subject matter, and the consequent conclusiveness of its final decree. For this view of the subject is counteracted by the consideration, that to conclude the rights of a person by any proceeding of a judicial nature, to which he was not a party, and against which he could not defend, is repugnant to the first principles of justice. Notice is so essentially necessary, that without it such proceedings are uniformly held to be void, except in cases where the statute has provided specific means of relief. So far has this principle been carried, that such proceedings have frequent-

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ly been adjudged void for want of notice, even where none was expressly directed by statute.—*Robinson vs. Robinson*, 1 D. Chip. R. 357—*Chase vs. Hathaway*, 14 Mass. R. 222.

But though this proviso does not strictly belong to that class of statutory enactments which are merely directory, yet we consider that a failure to comply with it has not rendered these proceedings void. The committee were required by their warrant to give the defendant notice, which they did. This was a notice expressly enjoined by the 84th section, and the defendant acted at his peril in disregarding it. By that notice he became so far a party to the proceeding, that he had a right to attend the committee while making the division, and an opportunity to contest their report. He also had a right, [under the 7th section of the act, to appeal from the probate decree accepting the report.—*Shumway vs. Shumway*, 2 Vt. R. 339.

It is true he had lost the benefit of the previous notice which the proviso requires, and for that cause might doubtless have procured the whole proceedings vacated on appeal. But having neglected to avail himself of these rights, he ought now to be bound by the decree. He should be considered as having waived all advantage from this defect. Justice and convenience seem to demand this result. It is far better that he should submit to some possible injustice in the division, than be allowed in this collateral manner to avoid it.

Judgment of county court affirmed.

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#### DAVID WARDEN vs. DENISON R. BURNHAM.

Assumpsit can be sustained only by that person from whom the consideration moves, and who has the beneficial interest in the contract.

This was an action of assumpsit in five counts. The first count declared in substance that the defendant together with the plaintiff, David Warden, Andrew Warden and William Warden had been co-partners in trade and that they had dissolved partnership, and the defendant had assigned all the debts and claims to the three said Wardens; that among these claims was one against Eliza Doe in account; that the defendant in consideration that said David would discount and deduct from said account of Eliza Doe the sum of seventy-one dollars and forty cents promised to pay him said sum on demand, that the said David did so discount and

deduct; but the defendant has refused to pay said sum. The second count alleged that *the plaintiff* had such account against said Eliza, and that *he* made such discount at defendant's request, &c. The third count alleged that the plaintiff had paid said sum to said Eliza at the defendant's request, and he promised to pay, &c. The fourth count was for money paid, laid out and expended. The fifth was for money had and received.—Plea, the general issue.

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This cause came to the county court by appeal. On the trial there the plaintiff gave evidence tending to prove, that before December 1830, the defendant together with David, Andrew and William Warden were copartners in trade, and had a book account of more than one hundred dollars amount against Eliza Doe, that this account together with all the other claims of the firm, were by the defendant assigned and belonged to David, Andrew and William Warden. In December 1830, the defendant sent by Mrs. Doe his written order, in the following words:—

“ Mr. David Warden,

Please deduct sixty-seven dollars and ninety-nine cents of Eliza Doe's account and charge the same to me.

D. R. BURNHAM.

December 17, 1830.

“ Add three dollars and seventy-two cents as interest to the above.

D. R. BURNHAM.”

This was delivered by her to the plaintiff, who had the charge of the accounts, and the plaintiff thereon allowed said amount to Mrs. Doe on her account. No other testimony was given, and thereon the county court instructed the jury that upon this evidence the plaintiff was not entitled to recover. The jury returned a verdict for the defendant, and the plaintiff filed exception, and the cause passed to this court.

*Underwood for plaintiff.* The question in this case is, did the county court correctly instruct the jury? Or rather, did the evidence offered by the plaintiff tend to prove the declaration, the plea being non-assumpsit?

The jury are to try the *issue joined* and no legal evidence offered tending to prove the issue on either side can be rejected by the court, neither can the court, in such case, direct the jury to find for one party, or the other, though the declaration or plea, *traversed*, be insufficient in law.—*Barney vs. Bliss*, 2 Aik. 60.—*French vs. Thompson*, 6 Vt. R. 59. The evidence in this case was not rejected on account of variance, nor could it be, as it clearly tended to prove the declaration. Why then should the court direct

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the jury to return a verdict for defendant? It was the peculiar province of the jury to weigh the evidence and determine whether it satisfactorily proved the declaration. If it did, they should have been instructed to find for the plaintiff. But plaintiff contends, the court assumed *that properly belonging to the jury*, and decided what should have been left to their determination.

But if, as the case stood before the jury, the question could have properly arisen, whether the action could be sustained in the name of the present plaintiff (which indeed, seems to have been made the turning question, by the court,) the plaintiff insists, the action is properly brought in his name.

The action on a contract must be brought in the name of the party, in whom *the legal interest is vested*.—1 East. 497.—8 T. R. 332.—1 Saund. 153, note 1.—1 Chit. Pl. p. 2. To whom is defendant *legally liable to pay* the amount of the order? He drew the order on plaintiff. The contract was made with plaintiff, as the order shows. None others than the plaintiff and defendant were parties or privies to this arrangement, and being made to plaintiff solely, it matters not whose is the benefit. A bond made to A to pay him or a third person for the benefit of the latter, A must have the action.—1 Chit. Pl. 3.—7 East. 148. When a contract not under seal is made with A, to pay him for the use of B, A alone can sustain the action.—1 B. & P. 98.

In the case on trial, though Andrew and William Warden may be considered as being beneficially interested in the contract made to plaintiff by defendant, yet plaintiff shall properly bring the action.

Again a contract not under seal, is made with A to pay B. A or B may sustain the action.—16 East. 370.—1 B. & P. 101.—3 B. & P. 149.—1 Chit. Pl. 4. In this case, should the considered as made to plaintiff to pay him, Andrew & William Warden, upon the above principle, plaintiff or all three may support the action. The same principle is recognized in *Boardman vs. Keeler*, 2 Vt. R. 67, and *Hilliker vs. Loop*, 5 Vt. R. 120-1, and cases there cited. A person holding a check or note payable to bearer as mere agent, may sue in his own name, and it does not lie in the mouth of the opposite party to object his want of interest.—7 Cow. R. *Marvin vs. Lamb*, 174, cited Chit. Pl. 7. n. 2. It is said the promise will be intended to have been made to the party from whom the consideration moved. This, however, is merely a rule of construction in pleading.—1 Chit. Pl. 266. Where a declaration sets out a contract it must contain the consideration and the promise. It must be alleged by and to whom it was



made. If it be alleged, that in consideration plaintiff would, &c., the defendant promised to do so and so, generally the law says the promise is alleged with sufficient certainty, as it will be intended, that it was made to the party from whom the consideration is alleged to have moved, to wit, the plaintiff.

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But perhaps this rule will apply to implied contracts, as if A purchase the property of B, C and D, generally the law will imply a promise to pay B, C and D. Yet if A makes a special agreement with B for the horse belonging to B, C and D, to which C and D are not party, and make a special promise to pay B, it is in violation of no rule of law for B to have the action.

2. But in this case the plaintiff contends, the consideration did move from himself. Defendant requested plaintiff to extinguish so much of Mrs. Doe's account, and directs him, (the plaintiff,) to charge it to him, (the defendant.) The action is not on the original account against Mrs. Doe. In that case plaintiff, defendant, W. and A. Warden would have the action, the law implying that her promise is to them from whom the consideration moved. If Andrew and William Warden were interested in the account, they must look to the plaintiff for the portion he extinguished. Plaintiff could not bind them to this transfer of credit, and if plaintiff answered the order it was at his own risk. The order was not directed to plaintiff Andrew and William.

That part of the declaration, setting out the partnership of plaintiff defendant and others, the account against Mrs. Doe the assignment to plaintiff and others by defendant, is but inducement and no substantial part of the pleadings, showing merely whence the consideration originated.

Again, plaintiff contends, he is the proper person to discharge this claim, and that such discharge from him would be a bar to the action. Again a judgment and satisfaction in this suit, would bar another action in the name of plaintiff Andrew and William, for the same cause. Suppose the action had been brought by plaintiff in the name of A. and W. Warden, and this order had been offered in evidence? Would not the variance have been fatal? Defendant might well have said, I know nothing of Andrew and William. I contracted with David, and he with me as the order shows. Why do they join? Perhaps defendant may have an offset against plaintiff which would be defeated were all three made plaintiffs. He only with whom I contract shall sue me.

Why then turn the plaintiff out of court, to make room for plaintiff A. and W. Warden, who, plaintiff contends cannot sup-

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port the action, and if they can, plaintiff alone may also have it.—  
2 Taunt. 325.—2 Vt. R. 67.

*Upham for the defendant.*—1. David Warden, we maintain cannot support this action on the order drawn by defendant in his own name. The amount of the order should have been charged to defendant on the company books. Burnham and the Wardens had been in trade together and the company demands had been assigned to the Wardens. Burnham was owing a private debt to a person who was indebted to the company and drew the order in question, directed to David Warden, who was the agent of the firm to settle the accounts, requesting him to pay the account and charge it to him the said Burnham. David Warden received the order and credited the bearer of it on the company books the amount of the order. But did not charge the defendant on the company books as he should have done with the amount. David Warden's partners were interested in this order drawn by defendant. It reduced the claim they had on the individual to whom the order was credited, and the defendant should have been made debtor to them to the same amount. After the bearer of the order had received credit for it on the company books, the legal interest in it was in David Warden and his partners to whom the partnership demands had been assigned. It would seem then, to follow as a necessary consequence, that David Warden cannot maintain this action. The law declares that the party to whose use the fruits of the suit are to be appropriated, and whose interest has in fact been impaired should complain.—Hammond on parties to actions, p. 4.

The legal interest in a contract, resides with the party from whom the consideration moves, and should be prosecuted in his name.—Hammond on parties, &c., 6.

From whom did the consideration move in this case? Most certainly from the persons who owned the company demands, and the suit should have been brought in their names.—*Dawes vs. Peck*, 8 Tr. R. 332.

2. David Warden, by bringing this suit in his own name has deprived defendant of all pleas in offset against the persons, to whom he had assigned the company demands, and for this reason the action should not be sustained in his name. It was not the intention of the defendant to make himself debtor to the plaintiff by drawing the order, and it cannot be supposed that the plaintiff when he received the order expected to call on the defendant for it in his own name.

The opinion of the court was delivered by

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COLLAMER, J.—It is first insisted that the proof presented in this case was precisely in accordance with the first count in the declaration, and directly tended to sustain that count, and therefore it was error in the court to instruct the jury, that the plaintiff ought not to have a verdict. It is true, in principle, that if the defendant could have demurred, but has traversed, and the plaintiff proves his count, he should have a *verdict* even though *judgment* would be arrested. He should not be allowed to recover his costs, and the experiment and expense of a trial on an issue on a count, which is so defective that judgment would be arrested. But in this case the count was good and could not have been demurred to with success; for the plaintiff alleged an express promise to pay him, personally and exclusively. Did the proof sustain or tend to sustain this allegation? The order contained no promise whatever, and none to the plaintiff was shown. The order was a request that a certain amount should be discounted to Mrs. Doe, and a direction to charge the same amount to the defendant. It was directed to the plaintiff, but he had no account against Mrs. Doe. An account however existed, belonging to the three Wardens. To this, the parties undoubtedly alluded, and on this account the discount was made; and most obviously the order was to be understood as a mere direction to transfer that amount in the books of the *Wardens*, from Mrs. Doe to the defendant; and such is not only its obvious meaning, but such is its legal effect; according to which legal effect, every contract must be declared on.

The law is well settled, that as relates to simple contracts the promise, to whoever made, innures to and is deemed a promise to whoever has the beneficial interest, which is the person from whom the consideration moves. The authorities on this subject are collected in *Hammond* and recognized at full length in the case of *Arlington vs. Hinds*, D. Chip. 'R. 431. Here the discount was made on Mrs. Doe's account, which account belonged to the three Wardens. From them the consideration moved, and therefore to them the defendants contract innured, and it was in legal effect a promise to them, not to the plaintiff.

The cases which decide that dormant, secret partners need not be joined, have no bearing on this case. There were no dormant partners in this case. Both these parties had been co-partners with the others when the account accrued and knew to whom it was transferred and of course could not be surprized with unexpected names.

Judgment affirmed.

## WASHINGTON COUNTY,

MARCH TERM, 1836.

PRESENT, HON. STEPHEN ROYCE,  
 " SAMUEL S. PHELPS, } *Assistant Justices.*  
 " ISAAC F. REDFIELD,

WASHINGTON,  
 March,  
 1836.

## JACOB PUTNAM vs. NEHEMIAH DUTTON.

In actions of book account, coming into this court by exceptions, no questions can be revised except questions of law arising either upon the facts reported by the auditor, or else found by the court, and placed upon the record.

It need not appear of record that the auditor was sworn. That will be presumed, unless the contrary appear.

If the auditor proceeds without evidence to find facts, or if upon incompetent evidence or against all evidence he find facts, this should be shown by the report or by evidence addressed to the county court, if the auditor refuse to report, and in that case the report cannot be accepted.

This was an action of book account. The auditor made his report, to which exceptions were made in the county court, which were overruled;—whereupon, the defendant excepted.

The questions will sufficiently appear from the exceptions and the opinion of the court.

*Auditor's Report.*—In pursuance of my appointment as auditor, I notified the parties to meet at the Inn of Horace Bliss, of Marshfield, on the 18th day of February, 1835, for the purpose of adjusting their accounts,—at which time and place I attended, and also said parties with their attorneys, and went to trial; and after a careful examination of the proofs and allegations, both of the plaintiff and defendant, it is directed by me, that said Nehemiah Dutton shall pay said Jacob Putnam the sum of nineteen dollars thirty-one cents damages, and his cost of reference.

NATH'L C. KING, *Auditor.*

The facts I find as follow:—The account was a charge by plaintiff, dated September 26th, 1826—"N. Dutton, to J. Putnam Dr. to 4350 brick, \$17 40. In the summer of 1826, Wm. Gordon, a boy 16 or 17 years old, making it his home at Dutton's, and son

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to Dutton's wife, called on Putnam, and engaged some brick of him for Dutton, and said Dutton would send a note for them when he sent for the brick. 4350 brick were counted out and placed by themselves in presence of the boy. When the boy returned, he informed Dutton he had engaged 4 1-2 thousand of brick for him at Marshfield, of Putnam, (say at \$3 a thousand.) Dutton then said, "I shall not look any further, for it is a dollar cheaper than I can buy elsewhere." Dutton sent for the brick, but did not send his note. Four years ago, Dutton promised to pay for the brick, after saying he expected Gordon had, or *would* pay for them.—Three years ago last fall, Dutton promised to pay for the brick when he got able. His ability to pay was offered by the plaintiff to be proved; but was not allowed, being thought unnecessary.

It was contended, on the part of the defendant, that the brick were purchased by Gordon, the boy, on his own account; and the promise made three or four years since to pay for the same, not being in writing, was within the statute of frauds, and void; and also the account was barred by the statute of limitation: but it was directed by me, that from the facts found, it was not within the statute of frauds; and that the promise made three or four years since, took the account out of the statute of limitation.

NATH'L C. KING, *Auditor*.

To this report, the following exceptions were made by defendant:

1st—That parol proof was admitted to show that the auditor had been sworn.

2d—Auditor's report is without form, &c.

3d—It does not appear from the report that defendant was ever indebted to plaintiff on book in any sum whatever; or that defendant ever had any brick of plaintiff.

4th—It does not appear that the boy made it his home at Dutton's, or was son to Dutton's wife.

5th—The auditor does not set forth, in his report, that he has audited the accounts between the plaintiff and defendant up to the time of auditing, or that he has audited any account whatever between the plaintiff and defendant, or that he has found any sum due to the plaintiff from the defendant to balance book accounts between them.

6th—The auditor has furnished no schedule of items allowed or disallowed, or at what price, &c. he fixed for brick; but he has allowed \$3 50, when the price was \$3 00.

7th—The counsel for defendant requested auditor to state several important facts; or, to state the evidence given in on the trial; but auditor refused, &c.

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*Mr. Merrill for plaintiff.*—The statute requires that the auditor shall be sworn; but does not require that this fact should be stated in the auditor's report. It may as well be proved by parol proof as any other way. Indeed this, or the certificate of the magistrate, is the only legitimate proof; for there is no statute making the certificate of the auditor proof of the fact. But it is believed this question has been too often decided to be questioned now.

*Second, Third and Fifth Exceptions.*—These seem to relate altogether to the form of the auditor's report. As no particular form is required, it is sufficient in this respect. The report states that the auditor notified the parties to meet him—the *time and place where*,—that the parties *then and there* met him with their attorneys "*for the purpose of adjusting their accounts*,"—that after hearing them, he finds defendant shall pay, &c. This is amply sufficient as to *form*.

*Fourth.*—The fourth exception is not true in point of *fact*; for it is stated in the report that the boy made it his home at plaintiff's. But were it otherwise, it would be perfectly immaterial, unless it can be shown that it is necessary that that fact should appear for the purpose of raising some question of law. This was only one among other *conclusive* facts to establish the original indebtedness of defendant.

*Sixth.*—This exception is not true in point of fact. The auditor has given a schedule of all the account exhibited to him: there was but one item, and that on the part of the plaintiff: and it sufficiently appears that that was allowed with interest; and that the sum of \$3 per thousand was allowed for the brick.

*Seventh.*—If defendant could show that he requested the auditor to state any additional facts, which should be necessary fairly to present any question of law to this court, some importance would attach to this exception. But this is not the case. The only questions raised in the case were,

1st. Was the original credit given to defendant, or was he the original debtor? This is a question of fact which the auditor decides in the affirmative: And

2dly. Was the account barred by the statute of limitations? The auditor found two separate, distinct promises to pay the debt.—These took the account out of the statute, of course. And after the auditor had found the fact that defendant was the original debtor, the statute of frauds could not affect the case.

It is not even hinted in the affidavit that there were additional facts which the auditor was requested to state.

*Mr. J. Bell for defendant.*—1. The defendant contends that from the facts found by the auditor in this case, the action on book cannot be sustained, there being no evidence that the articles charged were ever delivered to the defendant or his order.

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2. It does not appear from the record or the report, that the auditor was sworn.—Stat. p. 141.

The opinion of the court was delivered by

REDFIELD, J.—It is first objected that the report does not show any sale of the brick charged by plaintiff. But on examining the report, it does appear that a sale and delivery of the brick was made by plaintiff to a lad living with defendant, claiming to act as his agent, and that defendant acquiesced in the contract, and took and used them. It was agreed that defendant should execute his note for the price at the time of delivery ; but he omitting to do that, the plaintiff might well charge them on book.

As the right of action accrued more than six years before the commencement of the suit, it is insisted the action is barred by the statute of limitations. But the auditor finds a new promise in express terms, and within three years. This, or indeed a new item of credit, is sufficient to remove the operation of the statute of limitations.

It seems that in the court below, it was attempted to show that these facts were found by the auditor upon very unsatisfactory testimony. But unless the county court found the fact that the auditor proceeded to state facts upon incompetent evidence, or without evidence, and still accepted the report, it is not the subject of error.

If any question is to be made as to the competency of testimony, the auditor must be requested to report the facts necessary to raise the question : if he refuse, the county court will hear affidavits. But this court can never review their decision except as to questions of law arising on the report and bill of exceptions. The same is true of the refusal of the auditor to grant a continuance on motion of defendant. This was a matter of discretion with the auditor, and unless he was guilty of such abuse as to amount to corruption, his decision cannot be revised ; and in that case, the revision must be in the county court.

The only remaining exception of any importance is, that the auditor does not appear by the report to have been sworn. It is true that the statute requires the auditor should be sworn ; and if he proceeds without being sworn, and this is made to appear in the prop-

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er mode, the report could not be accepted. But this should be made to appear by proper evidence adduced before the court below. It is not required that the auditor should report the fact of his being sworn, nor is this properly within his province. The oath is administered out of court, by another officer, and is strictly a matter *in pais*, and not expected to appear of record. If it appear, it should be by the certificate of the officer administering the oath. But we think it may well be presumed under the general inference of *omnia rite acta*, as we presume the clerk of our court and the sheriff and his officers have been sworn. At any rate, as the county court expressly find the fact that the auditor was sworn, it cannot be assigned for error that the fact is not stated in the report.

The result is, that

Judgment is affirmed.

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# JAMES PIKE vs. ASAHEL BLAKE.

In an action of book account, sued before a justice of the peace, the want of service on a joint contractor must be pleaded at the first term, and if not so pleaded is waived.

The deposition of a party to an action on book, cannot be used as evidence before the auditor. Nor can that of an interested witness be so used.

A joint contractor, not a party to the suit, is interested to defeat the suit, and not a competent witness for defendant.

The caption of a deposition, taken to be used before an auditor, should state the time and place of trial.

A justice of peace in the state of New York, has authority to take depositions to be used out of that state.

This was an action of book account, sued before a justice of the peace. The writ issued against this defendant and another, and no service is made, nor any excuse for want of service upon the other defendant. This defendant entered a general appearance before the justice and went to trial on the general issue. The case came by appeal into the county court and this defendant then pleaded in abatement the want of service on the other defendant. The plea was overruled, and judgment to account being rendered the case went to an auditor. On the trial before the auditor the defendant offered the deposition of the other defendant, which was objected to and rejected. The other questions in the case will appear by the opinion of the court, delivered by:

REDFIELD, J.—The first question in this case arises on the plea in abatement. This plea is bad. It is out of time, being first



pleaded after one trial, upon the general issue. And being a defect, which might be cured by amendment, it is most clearly waived by not being pleaded at the first term. If it had been pleaded in time the officer might have been permitted to endorse his return of *non est inventus*, or the plaintiff might have amended by suggesting that the other defendant resided without the state, which by the other parts of the case proves to have been the fact.

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The next question in the case arises on the deposition of the absent defendant, which was offered by the other defendant. The deponent was a party to the writ, but not being served with process could not be considered a party to the suit. And if he were a party to the trial most clearly his testimony could only be received *before the auditor*. The statute has not made his testimony competent, except in answer to interrogatories put before the auditor.

The party is not made a general witness in the case, for if this were so he might testify on the trial of an issue joined to the jury, the contrary of which is well settled. A particular form of oath is to be administered, and by the auditor, or in his presence. But the deponent, altho' not a party to the suit, is interested to defeat the action, and is of course, not a competent witness for the defendant. For altho' the parties are admitted witnesses, as has been shown, yet the statute does not in other respects vary the testimony to be admitted before the auditor, from what it was at common law. Interested witnesses cannot be admitted of course. And it is well settled that a dormant partner or a joint contractor, not made a party to the suit, although a competent witness for the plaintiff is not competent for the defendant, being interested to defeat the recovery, and thus save his liability to contribute for payment of costs as well as debt.

The caption is also defective in not stating *when* and *where* the cause is to be tried before the auditor. It should be as definite in this respect as if taken so be used before a justice of peace. It being taken by a justice of peace in the state of New York, is well enough. The legislature of that state have seen fit to give this power to justices of the peace in reference to depositions, to be used out of that state.

The question of the joint liability of both defendants is found almost in express terms by the auditor. The result is, that the judgment of the county court is affirmed.

*J. L. Buck for defendant.*

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ISAAC GRAY, JR. *vs.* MOSES SHELDON, JR.

The statute in relation to erecting or altering school districts, requires that they should be defined by geographical limits, and be made to consist of *territory* and not of *persons*.

This was an action of trespass on the case, to recover of defendant, as prudential committee of district No. 14, in the town of Calais, on the alleged ground that the plaintiff not being an inhabitant of the district, and having no property liable to be taxed there, was aggrieved by being taxed by defendant. The only question necessary to be noticed here, arose in the court below on the construction of a vote of the town of Calais in town meeting, in these words: "To set plaintiff to district No. 3."

It being admitted that the plaintiff was an inhabitant of district No. 14 previous to the vote, if that had no legal effect to transfer him to district No. 3, he still remained liable to be taxed as he was by defendant.

The county court held the vote sufficient to transfer the plaintiff and his farm to district No. 3; and that, not being liable to be longer taxed in No. 14, the assessment was illegal, and the plaintiff entitled to recover; and directed a verdict for plaintiff, and allowed exceptions, and the case comes here for revision.

*L. B. Peck and S. B. Prentiss for defendant.*—1. The plaintiff was liable to be assessed for taxes in district No. 14, unless, by the vote of the town, his real estate or farm was set off and annexed to district No. 3.

The vote was, "to set off Isaac Gray, jr. to school district No. 3." The farm, not like personal property, passing with the person, is not annexed to district No. 3, unless it is included within the terms of this vote. Not being expressly mentioned, and no words used which comprehended it, it did not pass. Had the plaintiff lived in one district and his farm been situated in another, it would be very clear the vote would not pass the farm. And can the location of the person and the property alter the effect of the vote?

The vote was of no effect—not defining or fixing the limits of the district, but leaving them to fluctuate and change with every change of the residence of the inhabitant.—7 Pick. 106—12 do. 206—4 N. H. R. 478.

2. The action should have been *trespass* and not *case*.—11 Mass. 220—16 do. 213—13 do. 282—15 do. 144—10 do. 17—7 Conn. R. 550—5 do. 190—2 Greenleaf, 375—2 Vt. R. 499.

*Messrs. Merrill and Spalding, contra.*

The opinion of the court was delivered by

**REDFIELD, J.**—The decision of this question depends upon the construction the court give to the statute authorizing the subdivision of towns into school districts. Towns are required to “define and determine the limits of such school districts.” And a description of the same, and any alteration made therein, is required to be recorded in the town clerk’s office. From the language of this statute, it cannot be doubted the legislature intended that school districts should be defined by *geographical limits*;—otherwise, it would not amount to a *subdivision* of the town. If it were attempted to describe school districts by the names of the inhabitants, and as is frequently the case, the same person owned real estate in different sections of the town, it must lead to endless uncertainty and confusion. We believe such has been the contemporaneous construction of the earlier statutes upon this subject, which contained similar provisions. We are not aware that any different practical construction of the act to any considerable extent has obtained.— And as the contrary doctrine must leave the limits of school districts to be determined by oral testimony, we are not inclined to adopt it. After the subdivision of a town into school districts, and years of acquiescence, the division should be held sufficient, notwithstanding any formality in the vote or record. But when school districts have been long established within known boundaries, every reason would seem to require that those boundaries should not be changed except in conformity with the existing laws.

The same rule of construction has been adopted in some of the neighboring states in relation to similar statutes.—7 Pick. 106—13 do. 206—4 N. H. R. 478.

The same doctrine was held by this court in the case of *Dow vs. Smith*, 7 Vt. R. 465, in relation to the mode of setting out the limits of a village.

Whether the action should have been *trespass* or *case*, it is not necessary to be here decided. It is very certain that *trespass* is the most usual remedy, and by far the most appropriate form of action. For the abuse of legal process, *case* will lie; but for any act done under void process, the appropriate remedy is *trespass*. If this plaintiff had not been liable to taxation in district No. 14, the whole proceeding would have been *coram non judice*. But as we hold he was liable to be there taxed, the form of action is not material.

The judgment of the county court is therefore reversed, and the plaintiff become *non suit*.

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WINOOSKIE TURNPIKE COMPANY vs. SAMUEL RIDLEY, Jr.

An alteration of a deposition, by the magistrate taking it, after it is signed and sworn to, and without the assent of the deponent, if it be in any sense material, vitiates the deposition, and it is no longer admissible as evidence.

This was an action of trespass for burning the plaintiff's bridge over Onion River at Waterbury.

In the county court, the defendant, in support of the issue on his part, offered the deposition of Dan Corss, taken at Waterbury on the 24th day of March, 1835, before Wm. W. Wells, Esq., justice of the peace within and for said county of Washington.

The plaintiffs objected to the admission of said deposition, upon the ground that it had been *altered* by the justice, after it was taken, read over to the said Dan Corss, and sworn to by him, and after he had left Waterbury without the knowledge or consent of the said Corss. The plaintiffs proved, by Henry F. Janes, that he was present when said deposition was taken, as counsel for the plaintiffs: that the said Corss testified that on the Sunday evening before Moses French left Hawley's, where he was then living, he, the said Corss, had a conversation with said French *on* the bridge between Waterbury and Duxbury, and that said justice Wells so wrote said deposition; and that said Janes further testified, that after said deposition was sworn to, and after said Corss had left town, he called on said justice and copied said deposition, and that it then read, that the conversation between Corss and French took place *on* the bridge between Waterbury and Duxbury. The plaintiffs further proved, that at the time Corss swore he had the conversation with French *on* the bridge, there was no bridge there: it was not raised until some days after that time.—This he knew, and recollected at the time, but did not call the attention of the witness to it.

Paul Dillingham, Esq., counsel for defendant, stated by consent of plaintiff's counsel, without being sworn, that Mr. justice Wells, after the deposition was taken and sworn to, and after Corss had left town, told him, the said Dillingham, that he thought he had written the deposition wrong,—that Corss said the conversation was *at* the bridge instead of *on* the bridge; and inquired if there would be any impropriety in altering it so as to have it read that the conversation was *at* the bridge instead of *on* the bridge; and he, the said Dillingham, told him he thought not; and said deposition was altered and sealed up by said justice.

The counsel for plaintiffs, upon the proof aforesaid, insisted that

said deposition should be excluded as inadmissible evidence in the case; but the court overruled said objection, and admitted said deposition as proper evidence in the case, and charged the jury that they should take said deposition as it stood before it was altered, and consider that the said Corss had sworn that the conversation between him and French took place on the bridge instead of at the bridge.

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The counsel for plaintiffs excepted to the opinion of the court as to the admission of said deposition, and to the charge of the court to the jury in relation to said deposition.

The opinion of the court was delivered by

**PHELPS, J.**—The deposition of D. Corss was offered in the county court, and objected to, upon the ground that it had been altered by the magistrate taking the same, after it had been signed and sworn to, and without the knowledge or assent of the deponent, by erasing the word 'on' and inserting the word 'at.' This objection, although well-founded in fact, was overruled by that court, and the deposition admitted. To this decision the plaintiffs excepted.

Depositions are a species of evidence in suits at law altogether unknown to the common law. They are not used in England and many of our sister states. They are, moreover, a species of evidence of a most unsatisfactory character, and should always be received with the utmost caution. The legislature have guarded them with great care, and the courts have rigidly enforced all the safeguards which the legislature have established.

The statute requires that they shall be signed by the deponent, as well as sworn to. The object of signing is doubtless to make the deponent responsible for the phraseology of the deposition; for, by signing, he adopts the language as his own. Had the statute required that the magistrate only should sign the paper, the committing the testimony to paper might be considered the act of the magistrate, and the peculiar language used might perhaps be considered as his. In such a case, it might be competent for the magistrate, so long as the paper remained under his control, to correct the phraseology according to his understanding of the purport of the testimony.

But, under the statute, the language of the deposition must be considered as emphatically the language of the witness, and he

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alone is responsible for its correctness. If then a deposition be altered, in a material part, after it is signed and sworn to, it is no longer the thing sworn to, and the witness is no longer responsible for it. He certainly could not be convicted of perjury, if the alteration renders it false; and thus the legal sanction, upon which the legal character of the testimony depends, is removed. In short, the paper so altered is no longer the testimony of the witness, and cannot be regarded as such.

But it seems that the court, in this instance, permitted the deposition to go to the jury, accompanied with proof of its original tenor, and instructed them to regard it as evidence, in the terms in which it was originally written. Had the original expression been still legible, there might have been some plausibility in this course. But the writing, in this instance, was wholly obliterated, and its original tenor not discoverable upon inspection of the paper. Parol proof was resorted to, in order to ascertain the testimony of the deponent. The proof was therefore no better than hearsay. The evidence did not consist in the written deposition, signed and sworn to by the witness, with all the forms, and under all the safeguards provided by the statute, but in the testimony of third persons as to what the witness testified before the magistrate.

Another most satisfactory reason for rejecting the evidence, is to be found in the extreme danger of suffering the magistrate thus to tamper with the instrument. Every consideration of general expediency, as connected with the elucidation of truth, and with safety in the administration of justice, forbids it. To admit this evidence would be unsafe in the particular instance, and dangerous in the last degree as a precedent.

It is urged, however, that the alteration in this case is immaterial. It was doubtless considered otherwise by the magistrate who made it, as well as by the attorney of the party with whose concurrence it was done. And, in our opinion, it is so in fact. The word 'on' implies, not only that the bridge was standing, but also that the witness was on it when the conversation testified to took place. If the bridge was not in existence at the time, the circumstance certainly establishes an inaccuracy in the particular of either time or place. How far this might have impaired the credibility of the witness, in the minds of the jury, is not for us to determine. It certainly had such a tendency; and if so, it was material, whether in a greater or less degree, is unimportant.

Whether an alteration, in no sense material, as a correction of errors in orthography, or grammatical expression, would vitiate the

deposition, is a point not before us, and which we do not decide. But we are all agreed, that an alteration by the magistrate, after the deposition is signed and sworn to, without the assent of the deponent, in a particular in any sense material, is fatal to the evidence.

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Judgment of county court reversed, and cause remanded.

### REUBEN LAMB vs. DAY & PECK.

If an officer, by direction of a creditor, attach a chattel, and the creditor put it to use, with the assent of the officer, they are both trespassers *ab initio*. The rule of damages, in such case, is not, of course, the value of the chattels, but is the injury actually sustained.

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It was agreed by the parties in the above suit, which was brought to the county court by appeal, that the following facts shall be received by the court as the evidence in the case.

The defendant, Ira Day, procured a writ of attachment in his favor against the said Lamb, and gave said writ to defendant Otis Peck, who was constable for the town of Barre, that said Peck, as constable as aforesaid, attached a certain mare, belonging to said Lamb on said Day's writ, and said Peck took said mare into his possession, and during the pendency of said Day's suit against said Lamb, and before final judgment in said Day's suit against said Lamb, Day took said mare out of the possession of said Peck, and put her to hard labor, that is, run her in the stage every day for eight weeks before the action was commenced by said Lamb against said Day & Peck, and this using of said mare, by said Day, was known to said Peck, and by said Peck's consent; all which laboring of said mare was without the consent or leave of said Lamb any way whatever; said action of Lamb against said Day and Peck was commenced to recover pay for said mare on the 19th of January 1835, writ made returnable on the 31st January 1835, and from that time it was continued to the 21st of February 1835, at which time there was a trial on the merits of said action, which resulted in a judgment in favor of said Lamb against said Day and Peck, for damages eighty dollars and his cost, that afterwards, to wit, at the March Term of the supreme court in 1835, the said Day recovered a judgment in his said action against said Lamb and took out execution on which execution the said Peck, as constable, by virtue of said execution, publicly advertised and sold said mare thereon,

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and applied the avails in part satisfaction of said execution. The said action, Lamb against Day and Peck is trespass. It is further agreed, that if the court are of opinion that the said plaintiff can recover in said action, they are to allow the plaintiff Lamb, for his damages \$69,00, and if the court should be of opinion, that the plaintiff is not entitled to recover full value of said mare, than such damages as they should think proper. While the said Day was using said mare, the said Peck had knowledge of it, and took no measures to get her back into his possession, or prevent the said Day from using her as aforesaid.

*A. Kinsman attorney for plaintiff.*

*L. B. Peck attorney for defendant.*

On the trial upon the statement of facts, the defendants contended that trespass would not lie in the present case against either of the defendants, and that it could in no wise be supported against the said Day; that if it could be supported against either defendant, but nominal damages only could be recovered, as the plaintiff had received the avails of the mare she having been sold and applied on the execution in favor of the said Day against the plaintiff, the amount of which execution was more than the value of said mare. But the court decided the law to be otherwise.

The defendant also offered to prove, that the horse at the time he was sold, was of greater value than when he was put to labor by the defendant, which evidence the court excluded, and rendered judgment for the plaintiff for \$69,00 damages and costs; to which several decisions of the court the defendants excepted.

*L. B. Peck for plaintiff.*—1. This action cannot be supported in its present form against either defendant. By the common law, if a beast distrained was worked, the distrainer becomes a trespasser *ab initio*. The common law, in this particular, has been altered by several acts of parliament, so that the only remedy for the injured party in all cases of distress, other than those made *damage feasant*, is by an action on the case. The rigor of the common law induced the alteration. Ought it then, to be adopted here, and to be applied to the case where property is attached? No case, it is believed, can be found, where an officer has been held a trespasser for the moderate and proper use of beasts attached. When a pawn is of such a nature as to be a charge upon the pawnee, as a horse or cow, he may, in that case use the pawn in a moderate manner. He may ride the horse moderately, and milk the cow regularly, as if he were the owner; and if he derives any



benefit from the pledge, he must apply those profits towards his debt.—2 Kent's Com. 450. This rule is beneficial to both parties, and therefore, has been adopted. Why should not the same rule be adopted in cases of attachment? The interests of the creditor and debtor requires its adoption. It is not unfrequently the case that the expense of keeping property attached, such as horses and cattle, nearly or quite consume the value of the property before the suit is determined; consequently it is lost to both parties. If the rule was adopted that property of the latter description might be reasonably used in discharge of the expense of keeping, or that the creditor should be accountable for such use, and also for any injury the property might sustain, and for this he clearly would be liable, it would greatly promote the interests of all parties. The court are at liberty, as it strikes me, to adopt this rule. They are under no obligation to apply to this case the common law doctrine applicable to cases of distress, in England, if our circumstances and situation do not require it. There is no necessity for the recognition of this rule. It would be unjust in its operation, if applied to a case like the one at bar. The plaintiff is not without his remedy. He may recover of Day, or the officer, for the use of the mare; and if she was injured, he has his remedy by an action on the case.

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2. Day, at all events, is not liable in this action. When he took the mare out of the officer's possession, he trespassed upon the officer. The plaintiff had neither the possession, nor the right of possession. He certainly cannot sustain his action, for the violation of the officer's possession; and it is equally clear, that it cannot be sustained against him, for the subsequent use, for his act cannot be split up.—*Van Brunt et al. vs. Schenck*, 11 Johns. R. 377. It does not appear that Day was in any manner connected with the attachment, otherwise than being plaintiff in the suit. The court are not authorized from this fact to presume that he directed the officer to attach the mare. If this fact appeared, it could not alter the case, as an attachment gives the creditor no right to the possession of the property. It is in the custody of the law, and in the possession of the officer. Neither the creditor, nor any other person, save the officer, can be made a trespasser *ab initio* for using the property.

3. The plaintiff was entitled to nothing more than nominal damages. The mare having been sold and applied on the execution, in favor of Day, he ought not to be permitted to recover the full value here.—N. H. R. 71.—6 Mass. R. 20.—5 C. & P. 322.

WASHINGTON, If he holds the judgment rendered in the county court, he obtains  
 March, two satisfactions. This is opposed to the law and justice of the  
 1836. case, as it might be difficult for Day to recover that portion of his  
 Lamb judgment which was satisfied by the sale of the mare.  
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*Kinsman for plaintiff.*—1. The plaintiff contends that the county court did not err in deciding that this action could be supported, and that the plaintiff was entitled to recover of the defendants the value of the property. The decisions have been uniform and all in support of this position since Lord Coke's time down to the present, that where the law, and not a private party, gives a licence, and the party abuses that licence, he becomes trespasser *ab initio*. For where the law gives a general licence or authority, it is given conditionally, that it shall be used for that purpose, only for which the law allows it, and the law judges of and infers the original intention of the party from his subsequent acts.—*Gibs vs. Chase*, 10 Mass. R. 128-9.—*Orly vs. Watts*, 1 D. & E. 12.—8 Coke, six Carpenters case.—Yelverton 96.—Bac. Abr., Trespass B.—1 Chit. Pl. 199 and 207.—5 Vi. R. 274.—1 H. Black. 13.—Com. Dig., Trespass C.—3 T. R. 262.—12 John. R. 408, *Adams vs. Freeman*.—Salk 122.—Bul. N. P. 81.—1 Swift 528.—Cro. J. 147, *Shaw vs.* ———.—2 Stark. Ev. 809.—2 Roll. Abr. 562.—8 Coke 146, B.—3 Willes 20.

2. If the defendants were trespassers, although the first taking might be legal, still by the abuse of the authority, by which they took the property, they are in a legal point of view placed in the same situation as it relates to the trespass as though they took the property without any legal authority, and must be liable to the plaintiff for the value of it, and more especially Day who had no more right to use the horse than he would have had if it had never been attached, and by Day's suffering the horse to be sold after Lamb had commenced his suit and obtained judgment against Day and Peck for the value of the horse, cannot furnish any reason why the defendants should not pay the plaintiff the value of the property. Same authorities as cited before.

3. The defendant, Day being the creditor of Lamb, and procuring the mare to be attached on his debt, against Lamb, standing in that relation to the first taking if he afterwards used the mare himself, while she was in the custody of the law, he made himself a joint trespasser with Peck, and even a consenting by either of the defendants, that the mare might be used, though neither of them used her themselves, still both of them would be trespassers

by such consent.—11 John. R. 382.—1 Chit. Pl. in note 1, 199.—  
 1 Bin. 240.—*Hazard vs. Israel*, 11 John. R. 377.—2 Stark. Ev.  
 809.—Com. Dig., Trespass C. J.—13 John. R. 414.

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4. The court did not err in rejecting the testimony offered by the defendants, to prove the horse in as good condition when sold on the execution as it was when first taken, for two reasons : First, If the defendants had no right, by law, to use the horse while under an attachment, and by so doing were trespassers, is was wholly immaterial whether the mare was in as good condition when first taken or not : Second, The parties made a case and agreed in writing, upon the facts, which were to be submitted to the court for their decision, and those facts all stated in writing. Therefore it was improper and illegal to admit any other testimony than that stated in the agreement, because it was taking the other party upon surprise, as he would be unprepared with any testimony to rebut any testimony which might be introduced by the defendants, in as much as the parties mutually agree on all the facts in writing, which were to be submitted to the court.

The opinion of the court was delivered by

PHELPS, J.—There is no doubt, that the use of the horse by the defendant Peck, was a tortious act. The authority of a sheriff, with respect to property attached, extends only to the safe custody of it. He has no interest in it, except to retain it as security for the creditor: and whenever the use of it would impair its value, to permit such use would be to inflict an injury upon one or the other of the parties, without a corresponding benefit to either. There are indeed cases, where the use of a chattel might compensate for the expense of keeping it; and in such cases, there is a plausibility in permitting it. But as a general rule, it would be extremely unsafe and pernicious: and, inasmuch as there is no provision by law for adjusting such an account between the parties, we are not at liberty to countenance a proceeding so prolific of embarrassment and difficulty.

That the using the property by Peck, in this instance, would render him a trespasser *ab initio*, is a point too well settled to require discussion.

It is however insisted, that Day, the other defendant, cannot be made a trespasser by relation. This depends upon the question, whether he is to be considered as implicated in the original taking. If he is not, then certainly no subsequent tortious act of his could make him a trespasser in that respect. There is a strong presump-

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tion however in the outset, of his concurrence in the attachment made by Peck; and his subsequent adoption of that act, by taking the horse into his possession, and subsequently selling it on the execution, afford sufficient evidence of his participation. Being implicated in the original taking, the authority of the process was as necessary for his justification, as for that of Peck; and whatever would defeat that justification, would, of course, subject him to this action.

Had the subsequent tortious act been the act of the officer alone, without the assent or concurrence of Day, there would be good ground to argue, that he, Day, would not be affected by it. But as the act complained of, was the concurrent act of both the defendants, they are equally implicated. The justification being equally necessary for both, as to the original taking, and that justification being unavoidable, by reason of their joint act, the consequences must be the same as to both.

The case of *Van Brunt et al. vs. Schenck*, 11 John. R. 377, illustrates the distinction. Upon the first trial of that case, Schenck, not appearing to have participated in the original seizure, was held not to be a trespasser by relation. If a trespasser at all, it was only in the subsequent use of the vessel. But when, upon the second trial, his concurrence in the seizure appeared, he was held to be a trespasser *ab initio*, in the same manner as his deputy Van Buren, who made the seizure in fact.

In short, if Day had not been concerned in the first taking, he could be made a trespasser only by reason of the subsequent tortious use of the property, and in this view, the action might fail, for want of a right of possession in the plaintiff at the time. So if he had no agency in the after use of the animal, it might be questioned, whether he could be made a trespasser by relation by the act of the officer. But concurring, as he did, in both the acts, it is impossible to distinguish between him and his co-defendant.

The plaintiff's right of recovery being sustained, the next inquiry relates to the rule of damages.

Generally, the extent of the injury sustained is the criterion of damages. The value of the property taken, is not necessarily the *minimum* of damages. Whether it is so or not, in any case, depends upon the inquiry whether the chattel is wholly lost to the party. If not, then the rule of damages must conform to the actual injury, under the circumstances of the case. In this case, the horse is not lost to the party; but its value, at the time of the sale upon execution, has been applied in satisfaction of his debt; and

the extent of the injury depends upon the comparative value of the animal at different periods. If the value has been reduced by the transaction in question, the plaintiff has been injured in a comparative degree. But whether this injury be more or less, is a question for the consideration of the jury. It seems to have been supposed, that, inasmuch as the justification fails, none of the proceedings are proper to be considered in mitigation of damages. This is a mistaken view of the subject. The distinction between a full justification, and matter of mitigation, is obvious and palpable; and it is no answer to matter, which has a legitimate tendency to mitigate damages, that it falls short of a full justification.

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Placing the liability of the defendant upon the footing of the original taking, as an act of trespass, still the ultimate disposition of the horse is material to the question of damages; and, as the property was applied in satisfaction of the plaintiff's debt, that circumstance serves to reduce the damages accordingly.

This view of the subject is sustained by the cases cited by the counsel.—See 5 Car. & P. 332.—6 Mass. R. 20.—1 N. H. R. 91. And is so obviously equitable in its result, in this case, that we hesitate not to adopt it.

The county court having given the full value of the horse, we consider their judgment erroneous. It is therefore reversed, and the cause remanded.

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IRA DAY & CO. vs. CHARLES ROBERTS.

WASHINGTON,  
March,  
1836.

The form for an officer's return of a levy of real estate, promulgated by Judge Chipman, has been frequently adjudged sufficient.

"Good and lawful freeholders" imports "disinterested." The cases of *Price vs. Dodge*, 4 Vt. R. 191, and *Seymour's adm'r vs. Beach*, 4 Vt. R. 493, distinguished.

This was an action of the case brought against the defendant, as sheriff of Caledonia county, for the neglect of Benjamin Perry, a deputy sheriff of the defendant, in making an insufficient return of the levy of an execution in favor of said Ira Day & Co., against John Bolls. Plea—*General Issue*.

That part of the return involved in the question, was as follows:

"And the said parties, their agents and attornies, neglecting to choose appraisers to appraise said estate, I applied to Joseph Fisher Esq., a justice of the peace of the same county in which said estate lies, and who by law may judge between the parties in civil

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il causes, who appointed Jonathan Perkins, William Read and Hiram Wood, all good and lawful freeholders of the vicinity, to appraise the same, who being sworn as the law directs, on their oaths have appraised the same at the sum of thirty-nine dollars, in full satisfaction of the within writ of execution, and the legal cost thereon, arising as stated in the bill hereunto annexed, and I have set out the same according to the bounds above described. And on the same day and year aforesaid, I caused this execution with my return hereon endorsed, to be recorded in the office of the clerk of Caledonia county, and thereafterwards I returned the same into the office of the justice who issued this execution, and caused the same to be there recorded.

"BENJ. PERRY, *Dep. Sh'ff.*" (L. s.)

The court decided that said return was defective, and that no title would vest in the plaintiffs by virtue of said return.

The defendant then offered parol evidence to show that the said Jonathan Perkins, William Read and Hiram Wood, the appraisers mentioned in said return, were, at the time of their appointment, inhabitants of, and living in said Goshen Gore.

To the admission of which testimony, the plaintiffs objected, and it was excluded by the court.

The defendant then moved the court that the said Benj. Perry might be permitted to amend his return, by stating that the said committee were, at the time of their said appointment, inhabitants of, and living in said Gore;—which motion was overruled by the court; and judgment was rendered by said court, that the plaintiffs recover the amount of said execution and interest.

To which several decisions of said court, defendant excepted.

*Argument for defendant.*—The return follows what is called the Chipman's form, except in the following particulars:

After describing the land, it proceeds—"And the said parties, "their agents and attornies, neglecting to choose appraisers, to appraise said estate, I applied to Joseph Fisher, Esq., a justice of the peace for the same county in which said estate lies, and who, by law, may judge between the parties in civil causes, who appointed Jonathan Perkins, &c., all good and lawful freeholders of the vicinity, to appraise the same, who being sworn as the law directs, on their oaths appraised," &c.

The Chipman form is as follows:

"And afterwards, viz., at \_\_\_\_\_ on \_\_\_\_\_ I caused the same land, with the appurtenances, to be appraised by A B, &c., good and lawful freeholders of the vicinity, chosen, appointed, and sworn as the law directs, who on oath appraised," &c.

Three or four objections have been made to the Chipman form, but the case in 4 Vt. R. 493, *Administrator of Benjamin Seymour, vs. Robert Beach and Martha Miller*, established that form of return.

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It is believed that the case above referred to is decisive of the present. The return in this case seems to obviate all the important objections usually made to the form in Chipman, but one, viz: "That it does not appear that the appraisers *resided in the town where the land lies.*" And in this respect the return is the same, word for word, as that in Chipman; and of course has been decided valid.

It is stated that the appraisers were "*good and lawful freeholders of the vicinity, to appraise the same, who being sworn as the law directs.*"

The officer in this case having described, with sufficient precision, the manner in which the appraisers were appointed, it became unnecessary to use the words "*chosen, appointed;*" and these words in Chipman's form "*chosen, appointed and sworn as the law directs,*" relate altogether to the mode and manner of their appointment, and cannot, by any fair construction, relate to the qualification of the appraisers, or add force to the previous expressions "*good and lawful freeholders,*" which latter expressions alone describe their qualifications; for if they are *lawful freeholders*, they must be such as the statute has required.

Return valid, if made according to form in Chipman.—*Cleveland vs. Allen*, 4 Vt. R. 176—*Eastman vs. Curtis*, do. 616.

The officer must state that the justice who appointed the appraisers was one who by law may judge between the parties.—*Dodge vs. Prince*, 4 Vt. R. 191.

Not necessary that return should state that the money or property was demanded of the debtor.—*Eastman vs. Curtis*, 4 Vt. R. 616.

If an officer return that appraisers were sworn as the law directs, it is sufficient.—*Ibid.*

Admit that a return must be *full and complete*, in those parts where it deviates from established forms, yet those parts that conform to them are good. The case of *Eastman vs. Curtis* was one of this description. In that case, the court say, "The return in these particulars is conformable to the forms which have been long in use, and is not to be disturbed," &c.

*Second*.—It is submitted that the court erred in not admitting *parol proof* and refusing to permit amendments, &c.

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*Third*—Even if this return shall be considered invalid, it is contended that the action cannot be sustained.

1st. Upon general principles. Is this such a neglect for which an officer will be liable? Are officers who have been called upon to set off land, after using all their skill, and perhaps availing themselves of all the professional skill within their reach, in making out a return, answerable for a mistake to the amount of the land set off?

2d. Whether the appraisers lived in the town or not, the officer was obliged to take such as the justice appointed. He had no discretion in this respect.

*L. B. Peck for plaintiff.*—The levy is void for two reasons:

1. It does not appear that the appraisers were *disinterested*. The record shows them to have been *good and lawful* freeholders. Such they may have been, and yet have been *interested* in the case. It is true that these are the words adopted by Judge Chipman; but the officer has not undertaken to follow the form given by him, but has attempted to designate the manner in which the appraisers were chosen. He is, therefore, bound to show that the requisitions of the statute have been complied with.—4 Vt. R. 176. I endeavored to get over precisely the same objection in the case of *White vs. — Fox et al.*, decided in Orange county, March Term, 1834; but the objection was held fatal.

2. The statute requires that the appraisers shall be inhabitants of the *town or place* where the land is situated. The record shows that they resided in the *vicinity* of the land. This might be true, and they be resident in another town. This objection is also fatal.—1 Root, 196—5 Conn. R. 400, 403—7 do. 229.

3. This is a proceeding *in invitum*, and it is familiar law, at this day, that a record of this character cannot be aided by *parol*, or by any amendment.

The opinion of the court was delivered by

PHELPS, J.—This case turns upon the sufficiency of the defendant's return upon the execution in favor of the plaintiffs against Bolls. If the defendant's proceedings in relation to that levy be regular and valid, so that a good title was created by the levy, then the action cannot be sustained.

The first objection to the levy is, "that it does not appear, from the defendant's return, that the appraisers were disinterested."

The return does not say, in terms, that they were so. But the question is, whether it is not implied in the terms used.



Much nicety has obtained on this subject. I, for one, should have been better satisfied, had greater liberality been indulged in sustaining these levies. But the principle of strict construction was early adopted, and one nicety has furnished a precedent for another, until an unusual particularity has become incorporated into our law on this subject. It would perhaps have been better, had our courts adopted the practice of setting aside defective levies, in a summary way, with its natural consequence, of holding them not vitiated by defects of form, when attacked in a collateral way.—And it is hoped, that our recent statute on the subject, will work a salutary change in this branch of our law.

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Notwithstanding all the nicety which has been exhibited on this subject, the form of a return, promulgated by Judge Chipman, at a very early day, has uniformly been held sufficient, both in our state courts, and in the courts of the United States, from the period of its promulgation to the present day.—See *Seymour's Adm'r vs. Beach*, 4 Vt. R. 493. In that case, the return was held sufficient, although liable to the precise objection raised here.

The only expression in the return, and in the form of Judge Chipman, descriptive of the qualifications of the appraisers, is the following, viz: "good and lawful freeholders of the vicinity."

Does this import *disinterested*? The term *lawful*, as here used, has uniformly been understood as importing all the qualifications which the statute requires; and in this way only, can such a return be sustained. The terms have not been understood as importing merely that the appraisers were legal freeholders, but as implying that they were such freeholders as the law requires for this duty, or such as could lawfully discharge it. The qualification of *disinterestedness* is involved in this interpretation.

Upon this ground has the form of Judge Chipman been legalized, and by the repeated recognitions of its legality, has the term *lawful* as here used, acquired a definite legal signification, importing, among other things, that they were *disinterested*.

The cases of *Dodge vs. Prince*, 4 Vt. R. 191, and *White vs. Fox*, decided in Orange county, March, 1834, are cited as conflicting with this doctrine.

In the former case, the precise objection here raised was not started. The ground of the decision was, that the officer had not adopted the generality of the Chipman form, but had attempted to particularize; and having attempted to enumerate the several qualifications of the appraisers, it was necessary, upon common principles, that he should enumerate them all.

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The distinction between the two cases is very broad. Where the officer returns that the appraisers "were good and lawful freeholders," the terms imply the particular qualifications; and when he returns that they were "chosen, appointed and sworn, as the law directs," the expression imports that if they were appointed by a magistrate, he was a competent magistrate, or one who could judge between the parties.

But when he returns that "he applied to A. B., a justice of the peace, who appointed," &c., there is nothing importing that A. B. could, by law, judge between the parties. And where he proceeds, "who appointed C. D., a freeholder of the vicinity," he does not, even by implication, certify that C. D. was disinterested.

In *White vs. Fox*, the return was, "A, B and C, judicious freeholders." We held that "*judicious*" did not mean "*disinterested*."

The cases are therefore reconcilable, and the propriety of the decisions, which have sanctioned the form of Judge Chipman, is apparent.

In the return under consideration, the defendant has used the precise words of the Chipman form. It is true that he has not in all things followed that form, but he has in this particular, and, so far as he has done so, his return must be sustained.

The second objection is, that the return does not describe the appraisers, as freeholders *in the town*; but the remarks already made will apply to this objection—"good and lawful" import it.—In this respect also, he has adopted the approved form. And in *Seymour's Adm'r vs. Beach*, this objection was taken and overruled.

We are of opinion, that the objections to the return are not sustained, and that the decision of the county court was erroneous.

Judgment reversed, and cause remanded.

## ARUNAH SPEAR vs. WILLIAM DITTY.

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1836.

The bond, required by the act, relating to particular land taxes, passed Nov. 11, 1807, to be given by the collector, is sufficient, if it be given in double the amount of the tax-bill delivered to the collector, although it be not in double the amount of the whole tax upon the township.

Where the collector's sale was advertised at a particular time and place, and the collector's return states it to have been held in the town and on the day designated, it will be presumed, in the absence of proof to the contrary, that it was held at the precise time and place specified.

It is not necessary, that the town clerk *certify* the volumes, numbers, and dates of the several papers, in which the committee's and collector's advertisements are published; but it is sufficient, if all these particulars appear in his record of the advertisements.

It is not necessary that the collector's *rate-bill* should be recorded.

Ejectment for lot No. 3, in the 6th range and 2d division of lots in the town of Roxbury, drawn to the original right of Asa Taylor.—Plea, *not guilty*.

The defendant, in support of his defence, offered in evidence an act of the legislature, granting a tax of four cents per acre on the lands of the town of Roxbury, passed at their Oct. session in the year 1831, and insisted that the proceedings under said tax, in relation to the sale, were, in all respects legal and regular, and that the land in dispute, was sold for the payment of said tax, and that the defendant derived a legal title under said proceeding and sale. And among other things offered in evidence the bond of the collector, which was objected to by plaintiff, and rejected on the ground that said bond was not in double the whole amount of the tax assessed on said town. Also, offered in evidence, the record of the sale of said land for said tax, which record was objected to on the ground of the hour and dwelling-house where the sale was held not being mentioned in said record, which was rejected. The defendant then offered parol evidence to show that the sale was held at the time and place mentioned in the collector's advertisement, which was objected to, and rejected. To which decision, rejecting the evidence, the defendant excepted.

These and sundry objections to the regularity of the proceedings in relation to the vendue, which are stated in the opinion of the court, were made by defendant. Verdict and judgment for the plaintiff.

*S. B. Prentiss for defendant*.—1. The bond is in conformity with the requirement of the statute. It is to be in double the

WASHINGTON, amount of the tax the collector is appointed to collect," and he is  
 March, appointed to collect the tax which remains unpaid, either in labor  
 1836. or money, at the expiration of the time allowed by the statute to  
 Spear the land owners to work out their taxes. Previous to this time,  
 vs. all monies to be paid are to be paid to the committee appointed to  
 Ditty. superintend the expenditure of the tax, and all labor to be per-  
 formed in payment of the tax is to be performed under their di-  
 rection. Until the expiration of that time, the agency and duties  
 of the collector do not commence; then, and upon the contingen-  
 cy of non-payment, the tax is put into his hands for collection, he  
 is to give bonds, and to give the required notice by advertisement.  
 Can he be said to be appointed to collect a tax which never can  
 come into his hands for collection? If the legislature intended the  
 bond to be in double the amount of the tax *assessed* upon the  
 town, why not use language clearly and directly expressive of that  
 intention, and not language upon which a very different construc-  
 tion may, and we think, ought to be put? The bond then, being  
 in double the amount of the tax which was put into the hands of  
 the collector for collection, answered the requirement of the stat-  
 ute.

But the statute in this respect is merely *directory*. The object  
 of the bond is to ensure a faithful performance of his duty by the  
 collector in collecting and accounting for the monies due from the  
 delinquent land owners. In the case of *Phelps vs. Parks*, 4 Vt.  
 R. 488, the court decided a recognizance in less than double the  
 amount of the judgment, to be a compliance with the statute which  
 requires a bond in "double the estate or money recovered by the  
 judgment." So in Massachusetts, bonds, though not in strict con-  
 formity with the provisions of their statutes, as to the amount,  
 have been held valid.—7 Mass. 98 and 200.—8 do. 373.

Could not a suit upon this bond have been sustained against the  
 collector? If so, and it was a good and valid bond for one pur-  
 pose, is it not for all purposes?

Again, the bond is no part of the *title*, and the title under the  
 vendue sale cannot be affected by its want of conformity with the  
 statute.

2. The statute requires the sale to be held in the "town where  
 the lands are situated;" and it is only necessary that it should ap-  
 pear from the records that the sale was there held.

Parol evidence may be admitted, to show that the sale was held  
 at the hour and place where it was advertised to be held.

3. The town clerk is only to *record* the number and volume of  
 the papers in which the advertisements are inserted.

4. The collector has published the "delinquencies" in the form prescribed by statute—a list of the delinquent lands was furnished the collector; but, it is not necessary that this fact should appear from the records. The statute has not required it, and the court will not be disposed to require that to be done, which the statute has not required to be done.

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Ditty.

*L. B. Peck for plaintiff.*—1. The bond given by the collector, was for a sum less than the amount of the tax. The statute requires that the penal sum of the bond shall be at least double the amount of the tax the collector is appointed to collect. This is a positive requisition of the statute, and cannot be dispensed with.—1 Comp. Laws, 665.

2. It does not appear from the records of the vendue sale, at what time and place the vendue was held. The collector, in compliance with the statute, fixed upon a time and place of sale in his advertisement, and it should appear *affirmatively*, that the sale took place at the hour and place thus publicly designated. It has long been the settled doctrine of this court, that they could make no presumption in favor of a collector's sale of lands.

3. The town clerk has made no certificate of the numbers and volumes of the different papers in which the committee's and collector's advertisements were published, as is required by the act regulating these sales.

4. No rate-bill, or list of delinquent lands, was furnished by the committee to the collector. The statute provides, that if any proprietor, or land-holder, does not pay in labor or money to the committee, within the time by them advertised, the amount of his lot, the collector shall advertise "such delinquencies." How can he do this without a rate-bill?

The opinion of the court was delivered by

PHELPS, J.—The defendant claims title to the demanded premises, by virtue of a collector's deed, upon a sale of the land, at vendue, for taxes. Several exceptions are taken to the proceedings of the collector, which, it is alleged, are not in conformity with the statute. The case involves a subject of some difficulty. Great nicety has prevailed in relation to these titles; and, in cases of doubt, the inverted maxim seems to have obtained, *Ut res majis paret quam valeat*. They are said to be *stricti juris*—a proceeding in *invitum*, &c. This is true. Still some degree of reason and sense is to be exercised in ascertaining what right is; and although there may be no equitable consideration to aid such a title, still every stat-

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ute should have a rational interpretation and a reasonable effect. We ought not to discard those aids, which guide us in other cases; nor, by an unreasonable and senseless nicety, to defeat a solemn act of legislation. It is however admitted, that in interpreting these statutes, we should consider the title to be acquired under them as *stricti juris*, and should require a full and complete compliance with the requisitions of the statute. Before the title of the owner is divested by such a proceeding, we should insist upon every thing tending to the security of the owner, which is either prescribed in terms by the act—brought within it by a rational and strict construction, or which, in the nature of the transaction, is necessary to give ample effect to every safeguard which the legislature have endeavored to throw around the subject. But it is not our duty to legislate—to create artificial and unreasonable difficulties; nor by overnice and unmeaning technicality, without any rational purpose, to convert the proceeding into an idle ceremony.

It is objected to this proceeding,

1st, That the collector's bond is insufficient, because the penal sum is not equal to double the original amount of the tax.

It is difficult to conceive how this irregularity, if it be such, can have any reasonable bearing upon the rights of the plaintiff. The object of this bond is not the security of the land-owner against an illegal enforcement of the tax, but it is to ensure a proper accountability for the tax, after it is collected. It is not one of those safeguards, interposed between the tax-gatherer and the tax-payer, but has reference rather to the public interest, in the due accountability for, and expenditure of the tax. When this object is effected, the purpose of the law is answered.

Still, as the statute directs the giving a bond, it may be well to inquire whether the terms of the statute have been legally complied with. The direction of the statute is, that the collector shall give a bond, in "double the amount of such tax as he may be appointed to collect." Now this may mean, either double the original amount of the tax assessed upon the town, or it may mean double the amount due from delinquent land-owners, at the time when the tax-bill is committed to the collector for collection. If it mean the former, then the bond in question is insufficient; but if the latter, the bond is admitted on all hands to conform to the statute.

The course of proceeding directed by the statute is this: The committee, in the first instance, assess the tax;—they then publish a notice to the proprietors of the township, to work out their taxes within a given time, as directed by the statute: in case they make

default, it is then the duty of the committee to make out a rate-bill against the delinquent proprietors, and deliver the same to the collector for collection. Before he acts, he is required to execute a bond in "double the amount of such tax as he is appointed to collect." This bond is taken by the committee, who of course determine the amount in which it shall be given.

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Now it is to be observed, that the collector is not appointed to collect the whole amount of the tax originally, but such part only as may remain unsatisfied to the committee, whose duty it is to superintend the expenditure in the first instance. The amount of the tax which he is appointed to collect, is the amount of the rate-bill committed to him for that purpose. This amount is ascertained by the committee, and it is for this reason, probably, that the bond is required to be taken by them. It was probably the intention of the legislature to require a security in double the sum which might come to the collector's hands, and we see no reason for including in the security a sum which the law supposes is paid, before he is called upon to act, and for which he can, in no event, be responsible. We are therefore of opinion, that the amount of the tax-bill delivered to the collector is the proper criterion.

If it were otherwise, still the act in this particular is directory merely. It is necessary so to treat it, in order to carry into effect the intention of the legislature. No court would pronounce a bond of this kind void, in a suit upon it, against a delinquent collector, because the penalty might fall short of the precise sum required by the law. And if the bond be a valid and effectual security against the collector, it would be absurd to hold, that he is not qualified in this particular to act.

2dly. It is objected, that it does not appear, from the record of the collector's proceedings, that the vendue was held at the precise time and place stated in the advertisement. It appears however, to have been within the town, and upon the day specified; and this, in our opinion, is sufficient, inasmuch as no ground is furnished by the case, for presuming an irregularity in this respect.

It is said that no presumption is made in favor of such a title.—It is true that no essential requisite will be presumed; but, to a certain extent, presumptions may, and must be made;—otherwise we are driven to forced and violent presumptions the other way, which are not to be made. The return however refers to the advertisement, which implies that the sale was had agreeably to the notice.

3dly. Another objection is, that the town clerk has made no

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certificate of the numbers and volumes of the different papers in which the several advertisements of the committee and collector were published. No *certificate* of this kind is required by law.—The statute provides that “the town clerk shall *record* the advertisements at length, and the title, volume, number, and date of the papers in which they were inserted,” &c. This is done. All these particulars appear of record, as required.

4thly. It is further objected, that no rate-bill appears of record. The rate-bill is not necessary to be recorded. It was indeed necessary that a rate-bill should exist; but this might be proved by production of the bill itself. For aught we know, it was done; as no question of that kind is presented in the exceptions. The question before us is, whether the copy of record was admissible; and we hold that it was not necessary, for this purpose, that the rate-bill should appear of record.

Upon the whole, we are satisfied that the county court erred in rejecting the evidence offered. Their judgment must therefore be reversed, and the cause remanded.

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STATE *vs.* JOHN DOWNER and ARCHIPPUS FULLER.

If an officer attach personal property in good faith, which in fact did not belong to the person on whose debt he made the attachment, still it is not lawful for the owner of the property even, to resist the attachment, but he must resort to his action at law.

In an indictment against one for impeding an officer in serving civil process, the allegations must show the nature of the process, the manner it was attempted to be served, and the particular mode of resistance.

An indictment for an assault and battery of an officer in the execution of his office, as at common law, is good without setting forth the process or the manner of resistance, and may be sustained, notwithstanding the higher penalty superadded to the offence by the statute.

This was an indictment against the respondents for resisting an officer in the execution of his office. Plea—*not guilty*. The following is the bill of exceptions allowed in this case:

On the trial of the issue, testimony was offered on the part of the government, tending to show that said Churchill, being constable of Stowe, as described in the indictment, and having in his hands certain writs of attachment in favor of certain creditors of one Myron Fuller, who had then lately absconded, against said Fuller. The processes were conceded to have been regular and



legal. For the prosecution, testimony was also given tending to show, that said constable, on or about the day named in the indictment, at said Stowe, having made attachment of certain personal property of said Myron Fuller on said writs, and having the possession and control of said property by virtue of said attachments, the defendants came forcibly upon the plaintiff, and resisted him in the manner set forth in the indictment, by assaulting, beating, &c.

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The defendants offered testimony tending to show, that they acted as assistants to one Thomas J. Raymond and others, who were legally authorized to serve certain writs of attachment in favor of this defendant, Downer, against said Myron Fuller; and that said Thomas J. Raymond, on said writs, which were conceded, had made a previous attachment of the same property; and that what they did, was done in defence of possession acquired by virtue of this previous attachment.

The defendants offered also to give in evidence to the jury, testimony tending to show, that previous to the attachment by said Churchill, the said Myron Fuller had conveyed this property to Downer, and that Churchill had notice of this transfer, and that what they did, was done in defence of his property so acquired, and that the debtor, Myron Fuller, had no attachable interest in the property—not pretending that the testimony would have any tendency to convince the jury that the said Churchill had no grounds of believing that Myron Fuller had any attachable interest in the property, or that he acted in bad faith in attempting the attachment.

The court decided that unless the testimony was offered to make out one of the two latter propositions, it could not avail the defendant in justifying them in forcibly resisting the officer, and rejected the testimony.

The case was submitted to the jury under instructions from the court, to which the defendants do not wish to have exceptions.—The jury returned a verdict of *guilty* against both defendants.

After verdict and before judgment, the defendants moved the court to arrest judgment thereon, for the insufficiency of the indictment.

The court overruled the motion; but in consideration of the importance of the foregoing questions, have allowed the defendants this bill of exceptions to said decisions, and have ordered the case to pass to the supreme court for their final determination thereon.

The indictment was as follows:

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"The Grand Jurors, &c., present that John B. Downer, &c., and one Archippus Fuller, &c., on the 28th day of September, A. D. 1835, with force and arms, &c., in and upon one Stillman Churchill in the peace then and there being, and then being Constable of Stowe, in the County of Washington aforesaid, and in the due execution of his said office, then and there being, did make an assault, and him the said Stillman Churchill, so being in the due execution of his said office as aforesaid, then and there did hinder and impede, and then and there beat, wound, and ill-treat, and other wrongs to the said Stillman Churchill, then and there did, to the great damage of the said Stillman Churchill, and against the peace.

And the Jurors aforesaid, upon their oaths aforesaid, do further present, that the said John B. Downer and the said Archippus Fuller, on the day and year last aforesaid, at Stowe, in the County of Washington aforesaid, with force and arms at said Stowe, in and upon one Stillman Churchill, in the peace then and there being; and the said Churchill then being Constable of Stowe in the County aforesaid, and having in his hands certain writs of attachment to serve and return according to law, and then and there being in the due execution of his said office of Constable as aforesaid, then and there did make an assault on him the said Stillman Churchill, &c., then and there did impede and hinder, and then and there did beat, wound and ill-treat, and other wrongs to the said Stillman Churchill then and there did, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State."

*Upham for respondents.*—There are two questions in this case—The first arises upon a bill of exceptions, and the second upon a motion in arrest; and

1st, As to the bill of exceptions. The defendants, in the court below, offered to prove that the property which Churchill, the officer, attempted to attach as the property of Myron Fuller, was the property of one of the defendants, viz., John B. Downer, and on his farm, and that it was not liable to attachment as the property of Myron Fuller, and that the defendants used no more force upon the said Churchill than was necessary to prevent his taking away the property. This evidence was objected to by the counsel for the State, and excluded by the court. In this decision of the county court, we insist there was error.

It is a principle as old as the law itself, that a man may apply force to force, in defence of his person or property. If the property in question was the property of Downer, and on his farm, and not liable to attachment by Myron Fuller's creditors, Downer had a legal right to use all the force which was necessary to prevent Churchill's taking it away.

We have indeed fallen in evil times if we are not at liberty to defend our property from invasion, from whatever quarter it may come. Sheriffs and constables, like other trespassers, may be resisted unto blood, if necessary, for the protection of person or property.—2 Chit. Crim. Law, 70—*The King vs. Omer*, 5 East's Rep. 304—3 Black. Com. 4.

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2d, As to the motion in arrest. An indictment for impeding an officer in the execution of process, should state the process fully and at large.—See Precedents, 2 Chit. Crim. Law, 68 and 75.

In order to make it illegal to hinder and impede an officer in securing a party whom he attempts to arrest, it is necessary that the arrest itself should be lawful, and this must appear from the *indictment* itself. For if it be otherwise, even a forcible resistance may be defended, as any one may interfere to prevent an illegal caption of person or property.—2 Chit. Crim. Law, 70, n.—f East's Rep. 308.

The indictment must also show for what cause, and on what proceeding, and by what officer the defendant was about to be arrested.—Stark. Crim. Plea. 463—1 Russell on Crimes, 384, n. n.—8 Mad. R. 357—2 Swift's Dig. 325, 708, 710, 384, 385.

Again: The indictment should allege that the officer hindered and impeded, was acting under the authority of this state.—See Stat. 266, sec. 5: and also that the defendants knew the officer was in the execution of his office.

If we test the indictment in this case by the rules above laid down, we shall find it substantially defective.

In 1832, in this county, in the case of *State vs. The Knapps*, Judge Royce held an indictment like the one in question bad, and arrested the judgment.

*A. Spalding, State's Attorney.*—*First.*—Is the indictment sufficient?

Sec. 5, Chap. 32, of the Comp. Laws, p. 266, enacts, "That if any person or persons shall impede or hinder any officer, judicial or executive, civil or military, under the authority of this state, in the execution of his office, such person or persons, on conviction thereof, shall pay a fine not exceeding five hundred dollars each," &c.

The first count in this indictment is precisely according to the most approved forms.—See Chit. Crim. Law, 2 vol. part 2.—Archbald's Crim. Pl. 250—1 Vt. Rep. 331—2 Tyler's R. 212.

The indictment is good for a common assault and battery.—5 East. 304—3 Vt. R. 110.

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*Second.*—Was the evidence offered improperly rejected? It is contended not. The defendants did not pretend that the evidence would have any tendency to convince the jury that Churchill had no grounds for believing that Myron Fuller had any attachable interest in the property, or that he had acted in bad faith in attempting the attachment.

It is the policy of the law to protect officers. Where there are various claimants to property, the right should be peaceably settled in a court of law. The officer should be protected where he acts in good faith, and has reasonable grounds for supposing that the property belongs to the debtor.

Should the court adopt a different rule, it would inevitably tend to encourage breaches of the peace.

A private individual may retake his property where it is wrongfully taken from him, provided he can do it in a peaceable manner.—3 Black. Com. 4.

The opinion of the court was delivered by

REDFIELD, J.—We think the testimony offered by the defendants was properly rejected by the county court. It is well settled that one may defend the possession of his property against a stranger with such force as may be necessary. But this right cannot be extended to the case of an officer whose duty it is to attach property whenever he is requested so to do. He may or may not require indemnity for the act. But it would be too much to say that he must decide all cases of doubtful property at his own hazard, or that if he attempted to make an attachment when the property was not in fact in the debtor, he might by the owner of the property be resisted to any extremity. The rule would be the same when he called out the *posse comitatus*, and the question whether the officers of justice, or the rioters, shall be held liable to indictment, must depend upon the decision of some abstract question of property, which the sagacity of no man was sufficient to foresee. And if the owner of property may resist an officer in its defence, so may one who believes himself the owner; for it will not do to predicate crime upon so subtle a distinction as an abstract right of property. It must be something more tangible.

We believe the better and safer and only practicable rule to be, that whenever the question of property is so far doubtful that the creditor and officer may be supposed to act in good faith in making the attachment, the owner of the property even cannot justify resistance, but must yield the possession and resort to his remedy by

action. This is the only mode in which the question could be tried. And unless such a rule be adopted, no human sagacity is adequate to the decision of those nice questions which the duty of sheriffs and their officers involve.

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The rule here established does not impugn that which is found in the books, "that an illegal arrest may be resisted." If the process is void, or is misapplied, it is the same as if there were no process, so far as one's person is concerned. But the case of property is very different. It depends upon *criteria*, which are not the objects of sense.

It is well settled that if an officer have probable cause to suspect one of felony, he may proceed to arrest him by any force necessary, and is justified, notwithstanding the person shall prove to have been innocent.—2 Hale, 79—1 East. 301—*Samuel vs. Paine*, Douglass 357.—1 Russell on C. 504.

The question of the sufficiency of the indictment is all that remains. If either count in the indictment be good, the motion in arrest cannot prevail. The second count in the indictment, which goes upon the statute, is manifestly defective. The process should have been so far set forth, that the court could see that it was legal, and that the officer had authority to serve it. All the authorities, too, concur in requiring that the bill should contain an allegation of the particular mode of resisting the officer. And no doubt the mode in which the process was attempted to be executed, should be specifically set forth. And it should be alleged that the respondents knew of the character in which the officer claimed to act.—For all these reasons, the second count in the bill is bad.

The first count is for an assault upon the officer in the execution of his office. This does not conclude against the statute, and is strictly for an aggravated assault at common law. And it is too well settled to be discussed, that an assault and resisting one in the execution of any authority or power, is indictable at common law, and all the precedents of indictments for such offence are like the present. We think this count good as for an offence at common law. And as the statute has only superadded the higher penalty for the offence, this does not take away the right to proceed against the offender for the offence, as at common law, which can only be punished with fine and imprisonment in the common jail.—Doug. 445—2 Ch. C. L. 70—1 Russell, 48—2 Hawkins, 625, § 4.—1 Saund. R. 135, a (4)—*King vs. Dickinson*, 2 Salk. 46.

This count is in strict conformity with the precedents found in

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State vs. Downer et al. The judgment of this court is, that respondents take nothing by their motion or exceptions, and judgment was rendered against the respondents.

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THOMAS J. WOOD vs. TIMOTHY DUDLEY JR.

Distinction between a mortgage and a pledge. A mortgagor of a personal chattel cannot sustain trover against his mortgagee, unless the chattel be redeemed.

This was an action of trover for a horse.—Plea, *the general issue and trial by jury*.

On the trial the defendant produced the following contract :—

“ *Barre, February 25, 1834.*

“ Sold to Emerson, Dudley and Torrey, one bay mare for eleven dollars and forty-five cents, for which I have received my pay in cash, and deliver said mare to said Emerson, Dudley and Torrey as their own property. The condition of this bill of sale is such, that if I redeem said mare within four weeks, and pay the expense of keeping, with the above named sum of eleven dollars and forty-five cents and interest, then this bill of sale to be void, otherwise to remain in full force to convey said mare to Emerson, Dudley and Torrey, as witness, my hand.

(Signed,)

T. J. W.”

The plaintiff offered testimony tending to show, that at the time of entering into this contract the horse in question, was of the value of sixty dollars; that he was owing the defendant the amount named in the contract; that no other discharge of that debt was given, than would result from the contract, and that the horse was delivered over to defendant at the time of executing the contract; that plaintiff resided in the immediate vicinity of the defendant, and that the defendant and another of the firm referred to in the contract, without his permission, took the horse in question within the first four weeks, and the sleighing bad, drove her from Barre to Montpelier a distance of eight or nine miles and back, by which she was very materially injured and depreciated in value.

The plaintiff also offered testimony tending to show that after this time and before the expiration of the time set in the aforesaid contract for the payment of said sum of \$11.45, that he offered to pay defendant that sum on condition that defendant would pay him

for the damage done the horse, to which offer the defendant replied, let it be, and see how the mare comes out ; and afterwards, and without any thing further passing between the parties, the defendant in the month of August after, sold the mare.

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The defendant offered testimony tending to show, that the mare was of no more than the value of \$40 or \$45, when he received her, and that after that time the plaintiff, by defendant's consent, loaned her to go to Plainfield, by which she was injured, and that she was not materially injured by the use to Montpelier aforesaid, that the plaintiff gave defendant permission to use the mare to the extent he did use her ; that the plaintiff, at the time he offered to pay the sum named in the contract aforesaid, absolutely refused even to pay the sum, or to close the contract, unless upon the condition that defendant would pay him damages for the use of the mare as aforesaid, and that he afterwards sold the mare to pay the debt, and had always held himself ready to account for any balance which was in his hands.

The court charged the jury, that if they found the fact, that the mare at the time of the delivery to the defendant was of a very disproportionate value to the amount of the debt, that is, if she was then worth from \$40 to \$60, and that the debt being only eleven or twelve dollars, and that no discharge of the debt was given except what would result from the transaction itself, that the contract would be in law a mere pawn or pledge, of the property to secure the debt, and would not vest the general property in defendant.

That as to the right of the pawnee to use the thing pawned, almost every case must depend upon its own peculiar circumstances, and the established custom of the country upon that subject. As this contract was to run but a short time, as there was an express stipulation that plaintiff in case of redeeming should pay the whole expense of keeping as well as the debt, and as the plaintiff himself was admitted to reside in the immediate vicinity if they believed that fact, then the defendant had no right by this contract to put the mare to any such use as would amount to *service*, mere use about town which would be for the benefit of the mare, would not amount to a conversion, but if they found the fact proved that the plaintiff was in the immediate vicinity, and might have been consulted, and was not, and gave no permission to defendant, either for this use or to use the mare generally, and under these circumstances the defendant took the mare and drove her with two persons, and out of town a distance of eight or nine miles and the

WASHINGTON, sleighing bad, the court considered that such a use of the mare as by the terms of the contract under the circumstances the defendant was not warranted in putting her to, and would amount to a conversion of the property, unless there was some uniform custom of the country applicable to all such contracts, by which the defendant would have a right to use a horse pawned for the security of a debt, which was not attempted to be shown. But if the plaintiff gave consent, either general or express, or if the jury thought from the conduct or relation of the parties at the time, or their assertions as proved, they could be fairly warranted in inferring that the plaintiff gave consent, then the fact that the mare was injured in the use through the neglect of defendant, would not amount to a conversion. If they found a conversion here as above described, the plaintiff would be entitled to recover the value of the mare at the time of the conversion, deducting the debt and interest and keeping, to which defendant assented. As to the rule of damages, if they did not find a conversion here as declared, they would enquire further. If there had been no conversion previous to the offer to pay the debt, then the plaintiff had no right to annex any such condition to his tender, as he did, and the tender would amount to nothing, unless the defendant gave the plaintiff to understand and so intended to be understood that he would extend the time of payment and thereby induce the plaintiff to omit to make payment or tender at that time. If this was done the time would be extended. And if so, and the defendant sold the mare within the extended time, this would amount to a conversion. If no definite time was named, then it would be the duty of the plaintiff to redeem within a reasonable time. That the sale would not amount to a conversion unless the defendant intended to give the plaintiff to understand he would wait a longer time than he did wait, and then sold the mare without notice to defendant. If so, it would amount to a conversion. The jury would consider what was said and done and whether the plaintiff was reasonably warranted in expecting the time was extended beyond the 19th of August. If not, the sale would not amount to a conversion.

They would also consider whether the plaintiff gave the defendant to understand and so intended at the time of the offer to pay the money that he never would settle the matter unless upon the condition he then named; and the defendant's reply was made with reference to this understanding. If so, the defendant had a right to sell the mare in a prudent manner, and the sale would not



amount to a conversion. If they found a conversion in the last point, they would adopt the same rule of damages, giving only the value of the property at the time of the conversion, with the same deduction. The jury gave a verdict for the plaintiff. Defendant excepted.

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*Upham and Kinsman for defendant.*—1. The bill of sale from Wood to Emerson, Dudley & Torrey, was a mortgage of the mare in question, for the payment of \$11 45.—1 Pow. on Mort. 3 ib. 33, n. a.—4 Kent's Com. 132—*Burrow vs. Paxton*, 5 John. R. 261—*Holmes et al. vs. Crane*, 2 Pick. R. 607—*Brown vs. Bennett et al.* 8 John. R. 96—*Cortelyou vs. Lansing*, 2 N. Y. Cases in Error, 200—*Marsh vs. Lawrence*, 4 Cow. R. 461—*Gifford vs. Ford*, 5 Vt. R. 531—Story on Bailment, 197—*Ackley vs. Finch*, 7 Cow. 290.

2. A mortgage of goods differs from a pledge or pawn, in this, that the former is a conveyance of title upon condition, and it becomes an absolute interest at law if not redeemed by a given time, and it may be valid without actual delivery.—4 Kent's Com. 132.

In the case of a pawn, if no time be fixed by contract, the pawnor may redeem it at any time; and though a day of payment be fixed, he may redeem it after the day.—*id.* 132.

3. If the county court were right in deciding that the mare in question was pawned to Emerson, Dudley & Torrey for the sum of \$11 45, they were incorrect in deciding that the pawnees had no right to use her. If property pawned be such as not to be worse for use, as jewels, ear-rings, &c., it may be used by the pawnee.—2 Kent's Com. 450.

So, if a horse be pawned, he may be lawfully used by the pawnee, and it is no conversion.—4 Kent's Com. 450—Story on Bailment, 235, 236.

4. Driving the mare from Barre to Montpelier, before the expiration of the four weeks given to redeem her, was no conversion; and the jury should so have been charged in the court below. If the defendant injured her by immoderately driving, he may be sued for such injury in a proper action on the case, but trover will not lie.

5. The plaintiff cannot maintain trover for the mare before he pays or tenders the money for which she was mortgaged or pledged.—1 Chit. Pl. 175, and cases there cited.

6. If the time of payment was extended, the plaintiff should show that he tendered the money within the extended time; and

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7. The sale of the mare by the defendant, in the month of August, 1834, was no conversion.—2 Kent's Com. 579—2 Vt. R. 309, *Bullard vs. Billings*.

*Bell and L. B. Peck for plaintiff*.—1. The contract, under which the defendant claims, was a pledge and not a mortgage of the mare. Courts, in all cases of contracts, look to the intention of the parties, and give such a construction to the contract as the parties intended it should receive, if it can be done without violating any settled principle of law. The contract, in the present case, was drawn up by the parties, and, as might be expected, is very informal and loosely drawn. If we recur to the circumstances attending the execution of the contract, there is not much room to doubt, that the parties intended the contract should be in the nature of a pledge. The mare was worth some sixty dollars, and was delivered to secure the payment of an antecedent debt of only some eleven dollars. It is hardly to be supposed that either party contemplated that the mare should become the absolute property of the defendant, in case the debt was not paid within the time limited by the contract. This would be the result, if the contract is regarded as a mortgage. To give this construction to the contract, would violate the intention of the parties, and work a positive injury to the plaintiff.

2. If the contract was a pledge, this action may be well sustained. The defendant was guilty of a conversion by using the mare. The contract contained the stipulation that the plaintiff should pay her keeping, which removes all implied understanding, that the defendant was authorized to use her. He would not have been justified in driving her, in the manner he drove her to Montpelier, under any circumstances. Such violent use would be a conversion.—2 Cain's Cas. in Error, 200.

3. The sale of the mare without notice to the plaintiff, was a conversion beyond all question ; and the defendant having put it out of his power to return her, the plaintiff was not required to tender the amount for which she was pledged. On this point, all the cases agree.—2 Cain's Cas. in Error, 206—Story on Bailments, 236.

The opinion of the court was delivered by

PHELPS, J.—The only question in this case is, whether the contract in question be a mortgage or a pledge. If the former, the

plaintiff cannot recover ; but if the latter, he may recover, provided the proof makes out a conversion.

The distinction between a mortgage and a pledge, is important, as the effects of each are widely different. In a mortgage of a personal chattel, the general property passes to the mortgagee, subject to be redeemed, according to the terms of the contract ; and if not redeemed within the time limited, the property becomes absolute in the mortgagee. The consequence is, that the mortgagee may sell or otherwise dispose of the chattel immediately. But in case of a pledge, the general property does not pass, but remains in the pawnor,—the pawnee having only a special property, or lien ; and in this case, although the pledge may not be redeemed by the time limited, yet it retains the character of a pledge still.

Although the nature and consequences of these different contracts are thus different, yet it is often a matter of no little difficulty to determine whether a transaction be one or the other ; and I know of no criterion, on this point, except the intention of the parties as gathered from their contract. If the contract be in writing, it becomes a question of construction. The written contract is in these words : "Sold, Barre Feb. 25, 1834, to Emerson, Dudley & Torrey, one bay mare, for eleven dollars and forty-five cents. for which I have received my pay in cash, and delivered said mare to said Emerson, Dudley & Torrey as their own property. The condition of this bill of sale is such, that if I redeem said mare within four weeks, and pay the expense of keeping, with the above named sum of eleven dollars and forty-five cents and interest, then this bill of sale to be void—otherwise to remain in full force to convey said mare to Emerson, Dudley & Torrey.—As witness my hand.—Signed T. J. W."

It is evident that a mortgage was contemplated by this instrument. It is a mortgage in form and in terms. The general property is passed, subject to a redemption. It is a sale with condition. Had the parties intended to make it a mortgage, as distinguished from a pledge, they could not use stronger or more explicit language. Indeed, they could not add to it, unless they had used the negative language, that it was not to be considered a pledge. To hold the contract a mere pledge, is inconsistent with the terms of the instrument.

The contract being a mortgage, the foundation of the action fails. The horse having never been redeemed, the title of the defendant is absolute ; and this absolute title has relation to the date of the instrument. The general property being in the defendant

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WASHINGTON, at the time of the supposed conversion, and the plaintiff having  
March, only a right of redemption which is now extinct, nothing is left to  
1836 sustain the action.  
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Judgment reversed, and cause remanded.

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DANFORTH W. STILES vs. TOWN OF MIDDLESEX.

Damages were awarded and paid to a person, on account of a road laid out through his land; and said road, before being opened or made, was re-surveyed and altered, on the application of such person, but no part of said road was removed from his land. The report of the committee making such alteration was silent on the subject of damages. *Held*, that these facts alone did not entitle the town to recover back the damages so paid.

*It seems* that no part of such damages can be recovered back, by reason of the discontinuance of the road, after it has been opened and used as a highway. *Otherwise*, if it is discontinued and abandoned before it is opened or made.

This cause came up from the county court on the following bill of exceptions :

This was an action of assumpsit for monies, expenses and services, rendered in taking care of one Laura Hackett, and Richard Clifford.

*Plea*—general issue, and *plea* in offset for money had and received.—Mutual issues to the court.

The defendants, to support the plea in offset, offered parol evidence tending to show, that in the year 1830, the road commissioners for the county of Washington, laid out a road through plaintiff's land, and ordered that the town of Middlesex should pay as damages to the plaintiff, \$21; which was paid by said town: That the plaintiff, being dissatisfied with the road as laid by the county commissioners, requested the selectmen to delay the opening of it for the whole length for which it was laid out; and the selectmen did delay the opening of said road, on the plaintiff's agreeing to expend \$10 on a certain other road: That four years afterwards, the plaintiff, with the consent, in accordance with the wishes, and in pursuance of a contract with said town, that he should pay the one half the expense of said committee, which he has paid, procured the appointment, by Washington County Court, at their November session, 1834, of a committee, who altered about two-fifths of said road; leaving unaltered that portion which the plaintiff had made, principally before the laying out of the road by said commissioners; and the whole still running through plaintiff's land.

Which report was accepted, and the road laid out and opened accordingly. And that said committee did not award damages in the case.

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To the admission of which testimony, plaintiff objects; and it was excluded. Judgment for plaintiff.

To the decision rejecting said testimony, the defendants except.

*Merrill and Spalding in support of the exceptions.*—The facts are in short as follow: The commissioners laid out a road through plaintiff's land, taking as part thereof a road which plaintiff had made previously for his own accommodation, and which extended about three-fifths of the whole distance; and awarded as damages \$21, which defendant paid. The plaintiff was dissatisfied—requested delay, which was granted; and ultimately, the decision of commissioners was *reversed* by another board, and the road laid as plaintiff wished, and committee awarded *no damages*; and the whole road was altered or laid in a different place by the committee, except that part which plaintiff had previously made for his own benefit.

It will be noticed, that all the proceedings in this case (after the decision of the commissioners) were had at the request of plaintiff, and their decision *reversed* at the request of plaintiff.

The inference is, that plaintiff preferred the decision of the *committee without damages*, to that of the *commissioners with damages*.

To suffer him to retain the money, would be to permit him to derive benefit from both decisions.

*First.*—It is contended that this case is the same in *principle*, if not *technically*, as the case of a *reversal* of a judgment in an ordinary suit at law—in which case, no doubt, this action can be sustained.

The record in this case, it is true, may not, in point of *form*, read like a judgment of *reversal* in an ordinary suit; but in *substance* it is the same.

The decision of the county court, on the question of the acceptance of the report of the committee, has the effect to *set aside* and *vacate* and *reverse* the decision of the commissioners.

The commissioners say the road shall run in a certain direction which will prove an *injury* or *inconvenience* to the plaintiff to the amount of \$21. The committee say it shall run in a different direction, just as plaintiff wants it; and that instead of being a damage, it will be a benefit to plaintiff.

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Can plaintiff then retain the money with a good conscience ?

Perhaps no two cases ever did or ever will agree in all their circumstances. It is sufficient to support the action, to show that it is within the general *principles established* in relation to actions of this nature. In deciding actions of this kind, these principles should never be lost sight of.

Blackstone says, (3 Com, 163,) "This action is applicable to "almost every case where a person has received money which *ex equo et bono* he ought to refund."

Lord Mansfield says, (2 Bur. 1005,) "The gist of this kind of "action is, that the defendant, upon the circumstances of the case, "is obliged by the ties of natural justice and equality to refund the "money."

*Second.*—It is contended that this action can be sustained on the principle that the consideration has failed.

"Where a man has received money upon a consideration which happens to fail, the person from whom it is received may recover it back by action of *indebitatus assumpsit*, as money had and received to his use."—2 Comyn on Con, 45—2 Term Rep. 369.

The consideration in this case was the surrendering a public highway across plaintiff's land. But plaintiff was never called upon to give up this right. *Nothing* was done in pursuance of the decision of the commissioners. The part of the road which was worked was in the same situation prior to their decision, or, if any repairs were subsequently made, they were made for plaintiff's benefit, and not in consequence of that decision, or by the authority of the selectmen. Therefore, in this case, there is a *total* failure of the consideration.

The absurdity and injustice of suffering plaintiff to retain this money, will appear, by supposing that the last committee had also assessed 21 dollars damages. Would it not have been gross injustice to have compelled the town of Middlesex to pay two assessments, and but one road made? The case, as it now stands, is as strong in favor of defendant as in the case supposed.

"Money paid on account of services to be performed, may be recovered back in case of non-performance."—2 Com. on Con. 71.—*Wheeler et al. vs. Boast*, 12 John R. 363.

*Thirdly.*—But even if there had been part performance, or, more properly speaking, had the award of commissioners been partly carried into execution, and the farther prosecution been suspended, defendant would be entitled to recover; for,

It is contended that this case would then come within the prin-

ciple established in relation to sales, where part of the consideration fails.

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Although the law upon this point is unsettled, and the decisions contradictory, yet Judge Kent says, (2 Com. 473,) "In New-York, a partial as well as a total failure of the consideration may be given in evidence by the maker of a note to defeat or mitigate, as the case may be, the recovery."

*Fourthly.*—It is submitted that another principle, long since settled in actions of this kind, bears a strong analogy to the present case, viz :

That this action lies to recover money paid on a contract rescinded by one party, or where both parties mutually agree to a rescindment, &c. ; for, although in this case it cannot in strictness be said that the laying the road was a *contract* between these parties, yet the delaying to carry the decree into effect was in consequence of the mutual agreement of these parties, and in that point of view compares with cases of mutual rescindment, and the effect, as between these parties, was precisely the same ; for the result was in accordance with their wishes and mutual agreement.

The principle is thus laid down in 2 Com. on Con. 64 : "Assumpsit for money had and received lies when a payment has been made on a contract which is rescinded or put an end to, or when both parties mutually assent to its being rescinded.—"1 Term R. 186, 188.

*S. B. Prentice was heard on the other side.*

The opinion of the court was delivered by

ROYCE, J.—The case which the defendants offered to make out, under their plea in offset, has been compared to the compulsory payment of a judgment at law, which is afterwards reversed or set aside. And as in that case the money paid may generally be recovered back in assumpsit, so, it is contended, may the sum now claimed in offset. But the analogy is evidently too imperfect to be relied upon. Here, was no reversal, either deciding the original subject matter finally in favor of the plaintiff, or leaving it open for future decision. The very act which is called a reversal settled the matter the same way as before, with some corrections. This was all that the plaintiff applied for. He did not seek to have the road abolished, but only altered in part ; and that was done, leaving the whole road still upon his land. Nor is any thing gained in aid of the claim, by attempting to liken the present case to a contract rescinded by the parties. I shall therefore confine myself to the question of consideration.

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The payment sought to be recovered back was made in satisfaction of damages awarded to the plaintiff. Those damages were assessed as the probable amount of injury to be occasioned by the public easement in his land. In one respect, the just amount was incapable of any fixed and certain estimate, since the duration of the incumbrance could not be known. The road might be discontinued, and the easement thereby extinguished, whenever the competent authority should direct. But as the damages awarded could not afterwards be increased, so neither should they be subject to diminution or apportionment, with reference to such an event.— They operated as a legal compensation to the plaintiff, while the incumbrance should continue, be it for a longer or a shorter period. On such occasions, it is always supposed, however, that the injury will commence ; and therefore if the survey of a road is effectually abandoned before the road is opened or made, there can be no consideration for retaining the damages. In such case, they may undoubtedly be recovered back. But the present is not such a case. The re-survey and alteration of a road, without removing it from the party's land, is altogether a different affair from the absolute discontinuance and abandonment of such road. Nor does the silence of the last committee on the subject of damages furnish any certain inference that the altered road was in no degree injurious to the plaintiff. It receives a more probable explanation from the fact, that damages had already been paid. At all events, the equitable right of the plaintiff to retain these damages, is not disproved by the facts offered to be shown. And as he received them upon a just and legal consideration, that ground should be satisfactorily removed, before the claim in offset can be supported. The evidence was properly rejected.

Judgment of county court affirmed.

### WALLACE & PALMER vs. GEORGE W. BARKER.

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1836.

A wooden boot, hung up at the door of a boot and shoe-maker's shop as a sign of his trade, is liable to attachment, like other goods and chattels.

This was an action of trespass, to recover the the value of a wooden-boot, which the plaintiffs had hanging at the door of their shop, as a sign, with the name of T. P. Wallace on a piece of tin tacked on the said boot. Plea, *the general issue*, and closed to the court, with special notice, that he should show an attach-



ment of said property, by him, the defendant, as deputy sheriff, at the suit of a creditor of the plaintiffs.

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The plaintiffs, in support of the issue on their part, proved that they carried on the boot and shoe-making business in the village of Montpelier, and that the wooden-boot in question was taken by the defendant and carried away, and that it was of the value of \$20,00; that the name of T. P. Wallace was in gold leaf letters.

The defendant, in support of the issue on his part, proved the facts set up in his notice, and the further fact that the plaintiffs, at the time the boot was attached by him, the said defendant, had, besides said boot, a sign over their door, with their names on it, and the words "boot and shoe-makers" under their names; and the further fact, that at the time said boot was attached, all the personal property of the plaintiffs had been attached and taken away, and they had quit business in said Montpelier village.

Upon the facts above stated the court decided that said wooden-boot was not liable to attachment and execution, and that the plaintiffs recover of the said defendant, for taking said boot, the sum of \$20,00 and their cost. And the defendant excepted to the opinion and judgment of said court, and tendered his bill of exceptions, which was allowed and passed to this court.

*Upham for defendant.*—The bill of exceptions presents but one question for the decision of the court, and that is, was the property, described in the plaintiffs declaration, liable to attachment and execution?

1. We maintain that all the property of a debtor, not exempted by statute, is liable to attachment and execution.—Stat. 208, sect. 1.

2. That the property sued for in this case, is not exempted by statute, consequently, it was liable to attachment and execution.

3. The fact that the boot in question hung at the plaintiff's shop-door as a sign of their trade, did not exempt it from attachment. The case shows, that the plaintiffs had another sign over their door with their names and trade upon it. And also, that they had quit business before the attachment was made. The boot, therefore, was of no use to them as a sign of their trade.

4. If the property in question was not liable to attachment, because it was used as a sign of the plaintiff's trade, then, any amount of property, in the shape of a sign, would be exempt. The goldsmith may hang out his large gold watch, worth \$300, as a sign of his trade, and no creditor could attach it.

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*Dillingham for plaintiff.*—The wooden boot in question, was used by the plaintiffs as a sign indicating, not only what branch of mechanical business they were engaged in, but the place where they carried it on.

The question raised by the bill of exceptions, is, was it liable to attachment on *mesne* process or final execution.

1. "One cow, and such suitable apparel, bedding, tools, arms, and articles of household furniture, as may be necessary for upholding life," are by our statute exempt from attachment on *mesne* process and final execution.—Vt. Stat. p. 209, Slade's edition. And we insist that the boot in question was protected by the reasonable construction of this exemption in our statute. But say our opponents, this wooden boot does not come within the strict definition of the word tools, Suppose it does not, yet it is within the equity of the statute when liberally expounded.

The shoe-makers kit within doors, however extensive or complicated, is protected from seizure by the sheriff; and why should his wooden boot, which is set without doors, lack the same protection? All the reasons exist in favor of its protection which go to require the protection of its kindred within doors; and if the court do not close the door now which they have heretofore operated in the construction of the above statute, this article is exempt.

The words of the statute except "one cow," and in the case of *Leavitt vs. Metcalf*, 2 Vt. R. 342, the court have so construed that exemption, as to make it protect the butter made from that cow; of course the milk and the cheese made therefrom, of a last cow, are also protected. In that case the court construed the statute liberally, in favor of humanity, and certainly all mechanical pursuits should be encouraged for the public good, as well as to enable the mechanic to support his family; and his tools being protected, we see no reason why his sign, by all fair and liberal construction, should not be considered a part of them.

2. If the boot in question, was not exempt from attachment by our statute, still upon principles of policy, recognized by the common law, it would not be liable to distress or attachment.

The signs of inkeepers, merchants and mechanice, are of but little value to any one, save the original owner: for this reason it would be little better than a wanton destruction of property to suffer them to be attached, and sold on final execution. This destruction, or *great diminution* of value, to this kind of property, should exempt it from attachment.

A great portion of the value of a sign, consists of the owner's name lettered thereon. The name can be of no possible value to another; nay if the sign be sold to another person, it is utterly useless till the name be taken from it, and another put on. And we protest against robbery being committed under sanction of law.

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The opinion of the court was delivered by

ROYCE, J.—The statute of March 7, 1797, authorizes the levy of a writ of execution “upon the proper goods or chattels of the debtor—*Always excepting*, one cow, and such suitable apparel, bedding, tools, arms, and articles of household furniture, as may be necessary for upholding life.” To these exceptions others have been specifically added from time to time. And the statute of March 2, 1797, which authorizes the attachment of goods and chattels on *mesne* process, has been construed to contain on implied exceptions of all property exempted from the writ of execution.

It is quite obvious that the article in question is not to be ranked among any of the statutory exceptions. It was in no sense a tool or implement of the debtor's trade, but a mere sign or symbol of it.

But exceptions must exist independently of the statutes, and the question is, whether any such apply to the present case. In deciding this question, we must keep in view the nature and object of an attachment, as authorized by our law. It is a sort of sequestration of property, for the eventual security of the attaching creditor. The property thus taken is to remain in the custody of the law, to await the determination of the suit in which it is attached. And in most instances this is expected to require a considerable period of time. Hence an exception arises in favor of property which is peculiarly perishable in its nature; as fresh meat during a portion of the year, *Leavitt vs. Holbrook*, 5 Vt. R. 405, —fresh fish, as decided by this court in the county of Caledonia a few terms since,—green fruits and the like, whenever it is manifest that the purpose of the attachment cannot be effected, before they will decay and become worthless. As the policy of the law is not to authorize the destruction of property, but to enable the party attaching to obtain security for his claim, it impliedly forbids an attachment in these cases. The same principle applies, when the thing sought to be attached is in such a stage of manufacturing process, that its removal by an officer, or the suspension of care and labor upon it by the owner, would occasion a loss of the prop-

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erty, or a great damage to it. It was accordingly decided in the case of *Bond vs. Ward*, 7 Mass. 123, that hides in a tanner's vat were not subject to attachment.

It is insisted that the principle of exemption extends to all cases, where the thing attached could be of no substantial benefit to the creditor as a security ; or where it could not be expected to sell for a price bearing any reasonable proportion to its cost, and its real or imaginary value to the owner. Admitting this proposition to be just to some extent, yet any general rule of exemption founded upon it must be difficult of application, and of a doubtful policy. Indeed, the power of the court thus to limit and qualify the creditor's right under the statute may well be questioned, when the right can be exercised without injury to the property attached. The present case, however, does not require us to lay down any precise rule upon the subject, since the article in question appears to have possessed a well known value. It was equally appropriate for any one of the trade, and required no alterations on being removed from one shop to another.

The papers show that it was sold for about twenty dollars on the creditor's execution. This is evidence of its value as an article of sale, at least among particular tradesmen. In these respects it differed entirely from the ordinary signs of trade and professions. These are known to be of little or no intrinsic value, and useful only to those for whom they are made. We are all agreed that this piece of property was liable to attachment.

Judgment of county court reversed, and new trial granted.

CALEDONIA COUNTY,

MARCH TERM, 1836.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

PRESENT, HON. STEPHEN ROYCE, }  
 " SAMUEL S. PHELPS, } *Assistant Justices.*  
 " JACOB COLLAMER, }

NATHAN LORD, President of Moore's Charity School,

*vs.*

SAMUEL BIGELOW, *et al.*

CALEDONIA,  
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A plaintiff, who sues as a corporation, is bound to shew his corporate character, if required.

An act of the legislature, reciting a former statute, is evidence of the former statute.

A grant from the legislature, either to individuals or to a foreign corporation, gives them a capacity to take and hold the thing granted.

A tenant is estopped from denying the title of his landlord, in an action of ejectment brought by the landlord.

Such estoppel may be given in evidence on trial of the general issue, plead by the tenant.

This was an action of ejectment for certain lands in the township of Wheelock, described in plaintiff's declaration. *Plea*—the general issue, and also a plea in bar that there was no such corporation as plaintiffs claim to be. Upon both which pleas, issues were joined to the country.

The plaintiff offered to support the issues on his part by the testimony of Mills Olcott, Esq., to whose testimony the defendants objected; but Mr. Olcott testifying that he is the Secretary of the Board of Trust of Dartmouth College, and has the custody of the records, which were produced in court, and further that there is not in his possession or knowledge any records of Moore's Charity School, the testimony was admitted.

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Mr. Olcott testified, that fifty-one or fifty-two years ago, a school was in operation at Hanover, New-Hampshire, called Moore's Charity School; at which time Doctor John Wheelock, President of Dartmouth College, was at the head of said school as "President of Moore's Charity School," and had charge of the funds of the school, and continued in the office until removed from the office of President of Dartmouth College. Dr. Wheelock was succeeded as President of Dartmouth College by Drs. Brown, Dana, Tyler, and Nathan Lord, the plaintiff, in the order of time named. He has no certain knowledge that each of the presidents named, exercised the office of President of Moore's Charity School; but the school has been kept up until within three or four years last past, when it was discontinued for want of funds. It had always been understood that the charge and control of said school had been exercised by the President of said College, except that sometimes the Trustees of said College had given advice upon the subject to the President. He has never known of any officers or board of trust of said school except the President.

The entries of the former Treasurer of Dartmouth College, (Professor Chamberlin, since deceased,) in the corporation books pertaining to the treasury office, by which it appeared he had acted as agent for collecting the rents in Wheelock upon the land claimed by Moore's Charity School, were verified by this witness, by which it appeared he had kept the returns from these lands separate from the funds of the College. President Tyler and Doctor Lord, the plaintiff, did exercise and control the funds of Moore's Charity School, and had the charge and direction of the school up to the time it was stopped, as above named.

The plaintiff then offered in evidence an act of the legislature of this state, passed Nov. 5, 1808, purporting to be a *confirmatory* grant of lands in Wheelock, made to Dartmouth College and President of Moore's Charity School. To the admission of this act, the defendants objected, and insisted that the original grant, if there was one, as was pre-supposed by the act in question, and insisted by the plaintiff, should be produced; but the court decided otherwise, and admitted said act in evidence.

The plaintiff, in further support of the issues, offered in evidence a lease of the land in question, from John Wheelock, President of Dartmouth College and Moore's Charity School, to Samuel Ward, dated September 10th, 1794;—to the admission of which, the defendants objected; but the court overruled said objection, and suffered the lease to go to the jury as evidence in the case, but not as an estoppel in law.

The plaintiff then offered in evidence the following deeds, to wit :

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A deed from Samuel Ward to A. Porter, of said lot No. 77, dated October 18th, 1800.

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A deed from said Porter to defendant, Smith, of the west half of lots No. 77 and 78, dated September 23d, 1813, recorded in January, 1830.

A deed from Porter to E. Bigelow of the east half of lots No. 77 and 78, dated January 5th, 1810.

A deed from said Bigelow to Rufus and defendant Bigelow, of said east half of lots No. 77 and 78, dated April 14th, 1820.

A deed from Rufus Bigelow to defendant Bigelow, of the east half of said lots, dated June 27th, 1829.

To the admission of which said deeds, the defendants objected ; but the objection was overruled, and the deeds admitted.

It was also proved, that some five or six years since, both defendants, Smith and Bigelow, paid rent to Professor Chamberlin, who was the Treasurer of Dartmouth College. It was proved that defendants were in possession of the land described in plaintiff's declaration, under the deeds aforesaid, at the commencement of this suit, and the plaintiff had notified his readiness to receive rent according to the conditions of the lease, and defendants had refused to pay the same.

No other evidence than that above detailed was given tending to shew the existence of the plaintiff as a corporation.

The defendants contended, and requested the court to charge the jury, that there was not sufficient evidence to authorize the plaintiff to recover, and that the existence of the plaintiff as a corporation was not sufficiently proved to support the issue for the plaintiff, taken on the plea of *nul tiel* corporation, and that the verdict should be for the defendants. But the court ruled otherwise, and directed the jury, if they believed all the evidence on the part of plaintiff, they might return a verdict for the plaintiff against all the defendants. A verdict was accordingly returned for the plaintiff against said defendants.

To the decision of the court in admitting said parol evidence, said lease, act of legislature, and the said several deeds, and to the right of the court to charge the jury as above requested, and the direction given to jury as aforesaid, the defendants except.

Exceptions allowed, and cause passed to supreme court for revision.

There was also a motion in arrest filed by the defendants.

*Upham for defendants.*—In the court below, the defendants

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pleaded, first, The general issue—second, In bar that Nathan Lord was not capable of suing and maintaining the action in his own name, as successor of John Wheelock.—3 *Nul Tiel Corporation*.

The plaintiff joined issue to the country on the general issue, and traversed the two other pleas, and the issues were joined to the country.—We insist,

1. That the testimony of Mills Olcott, Esq. was improperly admitted in the court below. It had no tendency to support the issue on the part of the plaintiff. The existence, in point of fact, of a school at Hanover, fifty-one or two years ago, called "Moore's Charity School," was of no importance in the case. It had no tendency to show the plaintiff's right to sustain his action, and consequently should have been excluded. It was not competent for the plaintiff to prove himself a corporation with power to maintain this action by parol. He should have produced a copy of his act of incorporation, duly authenticated.—Angell and Ames on Corporations, 378, 379, 380—*Gospel Society vs. Young*, 2 N. H. Rep. 310—*Bank of Michigan vs. Williams*, 5 Wend. 479—*Wood vs. Jefferson Co. Bank*, 9 Cow. 194—*Utica Insurance Co. vs. Tillman*, 1 Wend. 558.

Neither was it competent to prove by parol that the plaintiff was President of Dartmouth College.

2. The records of Dartmouth College should have been excluded as improper evidence in the case.—1 Stark. Ev. 297, 298, 299; n. 1—*Loudon vs. Lynn*, 1 H. Black. R. 214, n. a—*Commonwealth vs. Woolper*, 3 Serg. & Raule, 29—*Jackson vs. Walsh*, 8 John. R. 226.

3. The act of the legislature of this state, passed November 5, 1808, entitled, "an act confirming the grant of the township of Wheelock to the Trustees of Dartmouth College, and the President of Moore's Charity School," was improperly admitted as evidence in the case, to support the issue on the part of the plaintiff.

This act, we insist, could not be made admissible evidence in the case, without first producing the original grant of 1785. The act produced by the plaintiff, and admitted in evidence in the court below, contains only one short section, and is in the following words, viz:—

"Sec. 1. *It is hereby enacted by the General Assembly of the State of Vermont, and declared, That the said school, whether known and called by the name of Moore's Charity School, or*



"Moore's Indian Charity School, and the President thereof of right, "had and has a legal capacity of taking, holding, and enjoying said "granted premises, according to the tenor, true intent and meaning of said grant; and the said grant of the township of Wheelock is hereby ratified and confirmed to the said School, and the said President thereof, and his successors, and to the Trustees of said Dartmouth College, with all the uses therein contained, according to the tenor, true intent and meaning thereof."

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I am aware that there is a long preamble to this act; but that is no part of the law.—See *Coleham vs. Cook*, Willes' Rep. 395. —*The King vs. Williams*, Black. Rep. 95.

This court cannot decide upon the true intent and meaning of the grant of 1785, without seeing it and giving it a careful examination. Lay the original grant out of the question, and the confirmatory act is of no importance: It is perfectly nugatory.

But if the act of 1808 amounts to a grant of the township of Wheelock, it will not help the plaintiff, because it is not granted to him or any corporation which he represents. The grant of 1785 is "ratified and confirmed to the said School and the said President thereof, and his successors, and the Trustees of Dartmouth College."

But again, if the act of 1808 amounted to a grant, it was void for the want of a competent grantee to take the estate granted.—There can be no valid grant without a competent grantor and grantee, and a thing to be granted: And one thing more is necessary; the thing granted must be accepted by the grantee.—4 Comyns's Dig. (A. 1.) 537.

It is said in Viner's Abr. 8 vol. 56, (H) "If a man devises to the Priests of a Charity or of a College in the Church of A., and dies, and at this time there is not any Charity or College, the devise is void, and shall not have any effect, though a Charity or College be afterwards made there."

So a devise made in remainder to a corporation, where there is no such, is void, though there be such a corporation made before the remainder fall.—8 Vin. Abr. 56, (H.)

In Chan. Cas. 134, it was decided that a bequest to the Parish of Great-Creaton was void because that parish was not incorporated.

In *Collison's* case, (Hob. 136,) the will made John Buett and others "feoffers of a home, to keep it in reparation, and bestow the rest of the profits on reparation of certain highways," and the

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devise was held utterly void:—*Woodman vs. Woodruff*, Amb. 636.

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In the case of *Maurice vs. The Bishop of Durham*, (9 Vesey 399,) the devise was to the Bishop in trust, to dispose of the residue to such objects of benevolence and liberality as he, in his discretion, should most approve; and it was determined that the bequest was void.

A grant to a person not *in esse* at the time of the grant, is void:—4 Comyn's Dig. Tit. Grant, (B. 1,) 538—*Sloan vs. McLonahy*, Ohio Cond. R. 761.

A grant to the parishioners or inhabitants of Dale, or to the commoners of a certain waste, and all such-like grants, are utterly void.—Coke's Lit. 3 a.—Shep. Touch. 235.

So a devise to the inhabitants of Roxford, living within the north-west parish, is void.—*Barker vs. Wood*, 9 Mass. R. 419.

So a grant to the people of Otsego County is void.—*Jackson vs. Cory*, 8 John. R. 385, 388.

A grant to a town not incorporated, is also void.—*Hornbeck vs. Westbrook*, 9 John. R. 73.

In *Green vs. Dennis*, (6 Conn. R. 293,) a devise in the words following was held void for the want of an act of incorporation:—"I give to the *Yearly Meeting* of the people called *Quakers*, of New-England, my farm in Pomsret, that I bought of Clark and Nightingale, the net income of which to be appropriated in aid of the charitable fund of the boarding-school established by *Friends* in *Providence*, to them the said people called *Quakers*, and their successors of the same faith forever."

In the *Baptist Association vs. Hart's Executor*, 4 Wheaton, 1, (in 4 Cond. R. 373,) a devise to the *Baptist Association that for ordinary meets in Philadelphia annually*, as trustees of certain military certificates, to constitute a perpetual fund for the education of youth of the Baptist denomination, who shall appear promising for the ministry, was held void, because the association was not incorporated at the testator's decease, and could not take the trust as a society.

If the doctrine of the cases cited is sound, how can the act of 1808 be considered a valid and operative grant of any portion of the township of Wheelock to Moore's Charity School, or to John Wheelock, as president of said school, and his successors in office? It is not pretended that the school was incorporated at the time of the original grant, and there is no evidence in the case showing that it has been since. Indeed, a subsequent incorporation would

not help the case.—*Baptist Association vs. Hart*, 4 Wheaton, 1. CALLEDOWIA,  
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Doctor Wheelock it seems, by the preamble to his act of 1808, doubted whether his school had a legal capacity to take and hold the lands in question by virtue of the grant of 1785. If the grant of 1785, so far as it related to Moore's Charity School, was void for the want of a competent grantee, of what avail was it for the Doctor to procure the same legislature to declare by a subsequent act, that the school had a legal capacity to take and hold the lands? Surely, such an act could not better the condition of Doct. Wheelock or his school. He could have remedied the evil only in one way, and that was, to have got his school incorporated by the legislature of New-Hampshire, and then applied to the legislature of this state for a grant of the lands to his school, by its corporate name. But never having procured an act of incorporation for his school, the question now arises, was there any school capable of taking and holding real estate under the grant of 1808? (if that act can be called a grant.) This question must certainly be answered in the negative. Lord  
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The case of *Fuller's Ex'r vs. Griffin*, (3 Vt. R. 400,) shows that a church or society that has no legal incorporation, cannot hold real estate under a will; and still less can persons in the name of office derived from such church or society, hold such real estate. It is clear then that Doct. Wheelock, and after him his successor as president of the school, could not take and hold the real estate in question, for the use of the school.

I am aware that there is a large class of cases in the English Chancery, founded upon the 43d of Eliz., showing that charitable bequests will be carried into effect, however vague and uncertain they may be. And if the objects of the charity are not designated with sufficient certainty in the testator's will, the court will supply the defect. But this class of cases can have no application to this case, if relied upon by the plaintiff: 1st, Because the 43d of Eliz. is not in force here: and, 2d, Because this is a suit at law, and the plaintiff must make out a legal title to the lands sued for, or he cannot recover.

4. The lease of the lands in question from Doct. John Wheelock to Samuel Ward, dated September 10th, 1794, was improperly admitted as evidence in the case. This lease had no tendency to show title to the lands in question in the plaintiff. If the suit were in the name of John Wheelock, executor, the lease might be proper evidence in the case; but the present plaintiff, I insist, cannot maintain an action of ejectment founded upon this lease.—

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If I am correct in my views of the law as to the lease, then all the copies of deeds which were admitted as evidence in the case to support the issue on the part of the plaintiff, should have been excluded. If the plaintiff intended the lease from Doct. Wheelock to Ward as an estoppel, he should have pleaded it as such.—1 Chit. Pl. 548—11 Co. 82, a.—Hob. 206, 207—2 Ld. Raym. 1052, 1054, 1550—1 Salk. 267—1 Saund. 325, n. 4—2 Str. 817—2 Barn. & Ald. 662—3 East. R. 346—Willes R. 9—Story's Pl. 47.

5. Whatever view the court may take of the act of 1808, we think it perfectly clear that the plaintiff cannot maintain this action in his own name, as successor in office to John Wheelock, late President of Dartmouth College.

Doctor Wheelock, it is true, on the 10th of September, 1794, made a lease of [the lands in question to Samuel Ward; but the case does not show that Ward took possession of the land under the lease, or that he ever paid Doct. Wheelock or any other person rent for the land. In the lease, Doct. Wheelock styled himself "President of Moore's Charity School," and made and executed the lease "in behalf of himself as President, and of his successors to that office." Ward covenanted in and by said lease to pay the rent for said land "to the said Wheelock, his successors, or such person or persons as he or they shall appoint to receive the same."

The plaintiff makes this lease the foundation of his action, and claims to recover, as the successor of Doct. Wheelock, in the office of President of the school.

The school not being incorporated, Doct. Wheelock, we maintain, could have no successor in the office of President of the school, who could maintain an action founded on this lease, or who would be known or recognized in law as his successor, for any purpose whatever.—6 Vin. Abr. (Tit. Corp. G. 6,) 275.

It is a well-settled principle of the law, that an obligation to an officer and his successor in office, does not enable the successor to sue in his own name, without a statute for that purpose.—2 Com. Dig. 263 (C.)—*Dana et al. vs. Gridley et al.* [1 New. R. 34—8 Dane's Abr. 511, 571—*Sumner vs. Stuart*, 2 N. H. R. 39—*Whitelaw vs. ———*, 1 D. Chip. R. 29—*Dyer's Rep.* 48, a.—Kyd on Corp. 31.

6. It appears from the bill of exceptions, that the defendants, Smith and Bigelow, some five or six years ago, paid rent for the lands to Professor Chamberlin, who was Treasurer of Dartmouth

College. This fact, however, will not in my apprehension, help the plaintiff. If the Trustees of Dartmouth College, who are a corporation capable of holding land, had brought the suit, and found on trial, that the defendants were in possession under them, or had admitted their title by paying them rent for the land, a question of more difficulty would be presented for the decision of the court.—But even in that case, though the defendants would not be allowed to dispute the plaintiff's title, they might in my humble opinion, plead in bar *nul tiel corporation*, and compel the plaintiffs to prove themselves a corporation. It does not follow of course, because an unincorporated society put a man into possession of land belonging to the society, that they can eject him in the name of the society.—(12 John. R. 401.) In such case, the action must be bro't in the name of the individuals composing the society. A married woman may own land and put a tenant in possession of it; but she cannot eject him in her own name. If any suit can be maintained for the lands in question, by virtue of the act of 1808, the Trustees of Dartmouth College should bring it.

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7. It appears from the bill of exceptions, that the counsel for the defendants insisted that under the pleadings in the case, the plaintiff was bound to prove himself a corporation, with power to sue, &c.; and requested the court so to instruct the jury. The court was also requested to instruct the jury "that the existence of the plaintiff as a corporation was not sufficiently proved to support the issue for the plaintiff, taken on the plea of *nul tiel corporation*. The court, as the bill of exceptions shows, refused to give the required instruction to the jury, and the defendants excepted. The question now arises, was the exception well taken? The court will perceive by looking at the declaration, that the plaintiff claims to recover the lands in question, in his corporate capacity, as successor in office of John Wheelock. The defendants' plea in bar denies this corporate capacity set forth in the declaration, and the plaintiff has taken issue upon it. Now let me ask, was it not necessary for the plaintiff to prove his corporate capacity, and show himself a corporation? We insist that it was; and rely upon the following authorities, viz: Hob. 21—2 Ld. Ray. 1535—1 Kyd on Corp. 292, 293, 284—Angell & Ames on Corp. 377—*Peters vs. Mills*, Bull. N. P. 107—*Jackson vs. Trustees of Union Academy*, 8 John. R. 378—*Dutchess Manufac. Co. vs. Davis*, 14 John. R. 238—*Bank of Auburn vs. Weed*, 19 John. R. 300—*Ernest vs. Bartle*, 1 John. Cas. 319—*Bile vs. Fourth Western Turn. Co.* 14 John. R. 416—*Central Manufac. Co. vs. Harts-*

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The above authorities show most conclusively, 1st, That the plaintiff was bound to prove himself a corporation, and, 2d, That he could not do it by parol. He should have produced a well authenticated copy of his act of incorporation.

On looking over the bill of exceptions, the court will discover that there was no evidence in the case, tending to show that the plaintiff was a corporation. Upon what ground, then, did the hon. judge, in the court below, tell the jury that if they believed the evidence, they *might* return a verdict for the plaintiff?

Lastly: The motion in arrest was filed for the purpose of testing the validity of the plaintiff's declaration. He claims, in his declaration, to recover as the successor in office of Doctor Wheelock. If we are correct in our views of the law, as to the right of a successor in office, to sue in his own name, this declaration is clearly bad, and the judgment should be arrested. The declaration should show the plaintiff's right to maintain the action. — *Central Manufacturing Co. vs. Hartshorne*, 3 Conn. R. 199.

*I. Fletcher for plaintiff.*—Action of ejectment for lands in the town of Wheelock. *Pleas*—1st, The general issue—2d, *nul tiel corporation*, and issues closed to the jury. By the issues taken, which are in substance but the general issue, it is necessary for the plaintiff to support two propositions: 1st, *His political corporate existence*—2d, *His right to the lands demanded*. All evidence tending to support the affirmative of either of their issues is pertinent and competent to be given in trial on the part of plaintiff.

To support the affirmative of the first proposition, the plaintiff offered the testimony of Mills Olcott, Esq., which was objected to, but admitted.

The plaintiff further offered in evidence the act of the General Assembly of the State of Vermont of November, 1808, as tending to prove that the legislature of this state had recognized the Rev. John Wheelock, President of Dartmouth College, as President of said School, and as a body politic and corporate, capable of taking

and holding the very lands in question for the benefit of said school, and confirming this power in his successors. To the admission of which act, the defendants objected; which objection was overruled, and the act read in evidence to the jury.

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The plaintiff offered in evidence a lease from the Rev. John Wheelock, President of Moore's Charity School, to Samuel Ward, of the lands described in the declaration, and copies of deeds duly executed and recorded of a regular chain of conveyance from said Samuel Ward to the defendants, accompanied with proof of the defendants' possession of the premises under said conveyance, of the payment of rents by defendants to the plaintiff up to November, 1830, of rent in arrear at the time of commencing this action, of notice from the plaintiff of his readiness to receive it according to the terms of the lease to said Ward, of defendants' refusal to pay the rent in arrear. To the admission of the aforesaid lease, the defendants objected, contending that the same should have been specially replied by way of estoppel, and could not be given in evidence under the issues taken: Which objection was overruled, and the lease, and the evidence offered with it, passed to the jury.

The plaintiff contends that the testimony of Olcott—the act of the general assembly, and the lease to Ward, accompanied with the testimony offered, was all pertinent and relative to the issues taken, and properly admitted as evidence in the case.

In the absence of all proof of record evidence, it is difficult to see why such evidence is not pertinent and relevant to prove the issue of *nul tiel corporation*, if evidence other than a grant or charter may be given to prove the fact under any circumstances. But other evidence than a grant or charter may be given to prove the existence of a corporation. Books of corporation are competent evidence to be received to prove its existence. These are but proofs of its corporate acts and doings. It is testimony of the corporation's own creating: one would think it much less satisfactory than the testimony of disinterested, credible witnesses.—*Carpen-ter's Company vs. Hayward*, 6 Petersd. 449—*Turnpike Company vs. McKean*, 10 John. R. 156.

The length of time corporate privileges have been claimed and exercised, is competent and proper testimony to prove the corporate existence.—*Grimes vs. Smith*, Co. R. 345:—*Beadle vs. Beards*, Co. R. 345.

In the case *Mayor of Hull vs. Homer*, (1 Cowper, 110,) Lord Mansfield said, that though the grant or charter be not produced, nor any proof adduced of its loss, facts and circumstances may be

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given in evidence to prove the existence of a corporation, and left to the jury for their consideration. This would seem decisive of the whole question upon the admission of evidence. The defendants say that there is no such body politic and corporate as the President of Moore's Charity School. The plaintiff offers evidence tending to prove that there *is* such a school,—that it existed for more than *half a century*,—that it has a President,—that for all that time he has been known and recognized as a body politic and corporate,—that he has exercised all the powers of a corporation,—that he has received and held lands as such—has leased them out, and collected rents, and done all acts that appertain to a corporation. If this does not tend to prove the existence of such corporation, it is very difficult to see what will.

But to entitle the plaintiff to recover in this case, it is not necessary to prove himself a body corporate and politic, *de lege*,—it is sufficient to prove himself so, *de facto*; for the defendants set up no estate in the lands claimed in their own right.—9 Mass. Rep. 507, *Rector of King's Chapel vs. Pelham*.

To the admission of the lease to Asa Ward, it was objected that it ought to have been technically plead and relied upon as an estoppel, and could not be given in evidence under the issues taken. It is presumed that this objection will not be insisted upon in argument. If it is, we reply, that there is a marked distinction between an estoppel technically relied upon, and an estoppel given in evidence under an issue formed. If technically pleaded and relied upon, the party pleading prays judgment if his adversary ought to be admitted or received to plead or aver any thing against his own acknowledgements, and here the pleadings end.—1 Chit. 617.

But the party may waive his estoppel, and close the issue. This does not conclude him of giving the matter of estoppel in evidence to the jury, as they may find the matter at large according to the facts, and the court give judgment accordingly.—1 Stark. 302.

But if the party who might have relied on the estoppel waives it, and gives it in evidence, the jury would not be warranted in finding a verdict contrary to the solemn admissions of the party without the strongest evidence of fraud.—1 Stark. 304.

All privies in estate, as vendee, grantee, assignee, &c. are bound by an estoppel.—1 Stark. 305.

All documents to which a person is party or privy, are admissible evidence against him. They operate as an admission on his part, or that of him through whom he claims, that the facts are true.—1 Stark. 301.



One who claims under a bond or deed, is as much estopped as the obligee or grantee.—1. Stark. 303.

An admission under seal is conclusive against the obligor, and estops him from asserting or proving the contrary.—1 Stark.

A deed of grant to a corporation is evidence of the existence of the corporation against all claiming under the grant.—*Mayor, Alderman & Co. vs. Blamiere*, 6 Petersd. 450.

But a tenant cannot dispute the title of his landlord. The plaintiff gave evidence that the defendants were in possession of the premises under the lease of the Rev. John Wheelock to Samuel Ward, and evidence tending to prove that he was the successor of said Wheelock, and also evidence tending to prove that the defendants had paid him rent as the successor of John Wheelock, up to November, 1830. This would seem to be conclusive.—*Driver vs. Lawrence*, Win. Black. R. 1259.—Adams on Eject. 247.—*Doe vs. Samuel*, 5 Esp. R. 174.—2 Bing. 54.—7 Mov. 298, 539.

It then manifestly follows, that if the above authorities be regarded by the court as law, the lease in question was not only competent and pertinent evidence in the case, but as against the defendants conclusive evidence of the existence of such a body politic and corporate as the President of Moore's Charity School, and of the plaintiff's right to recover in this action, provided the jury found the fact that plaintiff was the successor of John Wheelock, and that the defendants have paid him rents for the lands demanded. This disposes of the case as to the testimony.

But the defendants except to the charge, as well as to the admission of the testimony. If the refusal of the court to charge as requested, and the charge of the court as given, was such as the facts in the case called for, the plaintiff contends a new trial will not be granted. The defendants' request was direct and specific. They requested the court to charge, first, that there was not *sufficient* evidence to authorize the plaintiff to recover,—secondly, That the existence of the plaintiff as a corporation, was not *sufficiently* proved.

But the court refused so to charge, and did charge, that if the jury believed the evidence on the part of the plaintiff, they might return a verdict for the plaintiff. The charge of the court was correct. Had they charged as requested, it would have been manifest error.

Of the *sufficiency* of the evidence, the court do not speak: this is *wholly* left to the jury. Upon a motion for a new trial, upon the

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ground that the judge left it to the jury whether the evidence produced was *sufficient*, and this was a question whether the existence of a corporation was *sufficiently* proved, the court said it was properly left to the jury,—that with the *sufficiency* or *insufficiency* the court had nothing to do: it was a *fact* for the jury. That whether there be any evidence, is a question for the judge, whether the evidence be *sufficient* for the jury.—*Company of Carpenters vs. Hayward*, Doug 375.

This settles that branch of the charge where the court refused to instruct the jury as requested by the defendants.

But the defendants have moved in arrest for the insufficiency of the declaration. The defendants have not pointed out the defects: they can only be conjectured.

The plaintiff has not averred that he was a body politic, and how and when he was incorporated.

If it be the first, I only say it is a clerical mistake, or that the whole averment may be treated as surplusage; or, at most, it is but a good title defectively stated, which is cured by verdict.

To the second, I reply, that it is sufficient in declaring; to set forth the corporation by name only. Such are the precedents—such the authorities, and such the adjudged cases.—*Henriques vs. Dutch W. I. Co.* Petersd. 447.—14 John. *Dutchess Cotton Co. vs. Davis*, 245.—2 Cow. *Bank of Utica vs. Smally*, 378.—19 John. *Bank of Auburn vs. Wood*, 300.—2 Ld. Ray. 1535.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The plaintiff sues as President of Moor's Charity School and successor of John Wheelock; as a corporation sole.

As his corporate capacity is denied and is expressly put in issue by the pleadings, it was incumbent on him to make proof of this allegation. It is not important to enquire whether the pleas were good or not. There is no doubt that when a corporation commence an action in their corporate name, they must make proof of the fact if required.

In the supreme court of U. S., it has been decided, that if a defendant means to insist upon the want of a corporate character in the plaintiff, it must be insisted on by the plea in abatement or in bar. The court in this state has been inclined to adopt that doctrine, and it was on this ground, that the case of the *Boston Type and Stereotype Foundary vs. Spooner*, was decided. If

these decisions were correct, the plaintiff was bound to show his corporate character under the special pleas. If the special pleas were not good and the plaintiff would have been safe in demurring, it must have been on the ground that he was bound to show this fact under the general issue.

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In New York, it is decided, that in an action in favor of a corporation, they must show their character under the general issue, and there is an authority in Lord Ray to this effect. If they are thus required under that issue, the plea that there is no such incorporation would be bad ; as any special plea which denies what the plaintiff must show under the general issue, is bad. Hence the court in that state, has decided that such plea is bad. The doctrine adopted in this state is conformable to the latter decision in England and in the supreme court of U. S.

It is however immaterial in this case, as under one plea or the other, the plaintiff was bound to make proof of his corporate character. For this purpose he introduces parol testimony, and the act of the legislature of this state, passed in 1808. The act of 1808, is in the following words :—

“ *Whereas*, a grant has heretofore been made under the authority of the State of Vermont, and a charter regularly issued under seal of said State, bearing date the 14th of June A. D. 1785, to John Wheelock, President of Moor’s Charity School and the trustees of Dartmouth College, of a township of land by the name of Wheelock, the one moiety thereof to the said President, and his successors in office for the sole use and benefit of said school, and the other moiety thereof to the said trustees, for the use and benefit of said college, forever ; and whereas doubts are entertained, whether said school had a legal capacity to take said grant, and disputes have thereon arisen ; and whereas, also, the said John Wheelock, in behalf of said school and college, has by memorial, petitioned this legislature to pass an act declaring that the president of said school, for the time being, with the advice and consent of the trustees of said college, may and shall expend all the avails accruing to said school from the said granted premises, agreeably to the true intent of said grant.—Therefore,

“ *Sec. 1. It is hereby enacted by the General Assembly of the State of Vermont, and declared*, That the said school, whether known and called by the name of Moor’s Charity School, or Moor’s Indian Charity School, and the president thereof, of right had and has a legal capacity of taking, holding, and enjoying said granted premises, according to the tenor, true intent and meaning of said grant, and the said grant of the township of Wheelock is hereby ratified and confirmed to the said school, and the said president thereof, and his successors, and to the trustees

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" of said Dartmouth College, with all the uses therein contained according to the tenor, true intent and meaning thereof.

" *And it is hereby further enacted*, That the president of said school, for the time being, with the advice and consent of the trustees of Dartmouth College, and who are hereby declared to be trustees of said school and not otherwise, may and shall expend all the avails accruing to said school from the said granted premises agreeable to the true intent of said grant.

The act itself without the recital in the preamble, and with it, undoubtedly, gives a corporate character and capacity to sue to the president of Moor's Charity School and his successors in office, and whoever is now, or shall be hereafter president of that school, have a legal capacity to take hold and convey whatever is granted to them and maintain any actions necessary to protect the property granted. It is insisted that the statute should not have been admitted in evidence, without producing the grant and charter of 1785. As it respects those parties, the preamble or recital was evidence of the grant or charter therein mentioned. No principle is better established than that the recital of a deed in a subsequent deed is evidence of the former against a party to the latter, though it may not be against a stranger or against one who derives title from the grantor, before the deed which contains the recital. A charter from the government reciting that a former charter has been surrendered, is evidence of that fact. The confirmation grants, from the governor of New York, reciting the surrender of the New Hampshire grants, have always been considered as sufficient evidence of the surrender. The legislature of the state of Vermont, the sovereign power, in 1808, passed a declaratory and confirming statute, in which they recognize and declare that on the 14 June 1785, a grant was made under the authority of the state, and a charter issued to John Wheelock, President of Moor's Charity School, and to the trustees of Dartmouth College, of a township of land, one moiety thereof to the said president and his successors in office. This is sufficient evidence of that fact as against the state of Vermont and all persons who claim under the president of that school.

A further objection is then raised to this statute, that it was void for want of a competent grantee to take, and a variety of cases have been referred to, which have all been before the court in another case arising on the will of Mr. Burr.

There is no doubt that in every private grant there must be a person competent to take; a sufficient grantee, or the grant will be inoperative and void.

But in a public grant emanating from the same power, who can create a corporation, the very grant or charter creates and gives the competency to take.

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Thus the original charter, and beyond all doubt, the statute of 1808 made the president of the Charity School and his successors in office, a corporation capable of taking and enjoying the benefit of the grant. The objection that this was a foreign corporation, is of no avail; whether it was expedient to make this grant to a foreign corporation, was a question addressed to the legislature. They undoubtedly could give legal existence to a body of men living without their territorial limits or to a corporation existing in a foreign government. In this view of the case it is not material to determine whether the evidence of M. Olcott was admissible to prove the existence of a corporation. The broad position assumed by the counsel for the defendant, that the existence of a corporation, can only be proved by the act or charter of incorporation as a certified copy thereof, cannot be sustained. A corporation may exist by presumption. Several instances are mentioned in the case of *Searsbury Turnpike Company vs. Cutler*, 6 Vt. R. 315, when the existence of a corporation may be proved by other evidence than the production of the charter.

In further examining this cause, we find that the defendants claimed title by virtue of several *mesne* conveyances from Samuel Ward, and that Samuel Ward's title was a lease for 998 years from Dr. Wheelock as President of Moor's Charity School, as well as of Dartmouth College.

A tenant is estopped from denying his landlord's title. A person executing a deed is estopped from denying a recital in the deed. And when a party relying on matter of estoppel has no opportunity of pleading it, he may give it in evidence, and it will have the same effect as if pleaded. An estoppel arising from the fact of tenancy under a landlord, can only be taken advantage of in an action of ejectment by giving it in evidence. A landlord commences an action of ejectment;—the defendant pleads *not guilty*, and on trial attempts to set up a title adverse to his landlord;—the landlord has no opportunity of pleading the lease as an estoppel, but must rely upon it as evidence. The effect of this lease from Dr. Wheelock was to estop Mr. Ward and the defendant, who claims under him, from denying the title of Dr. Wheelock as President of Moore's Charity School, and his successors in that office, to the land in question, if the corporate character was sufficiently estab-

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 March, the act of 1803 established that character.  
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Lord On this view of the case, we have no hesitation in saying, that  
 vs. the President of Moore's Charity School, for the time being, has a  
 Bigelow et al. capacity to take the one half of the town of Wheelock, granted in  
 the year 1785 :—that the defendant is estopped from denying the  
 title of the President of said school thereto, and must pay the rent  
 or yield up the possession of the land, and that an action may be  
 maintained against him therefore by the President of the school.

There is another question remaining in this case, which is attend-  
 ed with more difficulty—that is, whether Dr. Lord, the present  
 plaintiff, is the successor of Dr. Wheelock, as President of that  
 school. That he is successor as President of Dartmouth College,  
 is clear. If the act of the legislature of New-Hampshire, passed  
 in June, 1807, which was given to us among the other papers, but  
 was not in evidence, and is not a part of the case, had been given  
 in evidence on the trial by the jury, the judgment of the county  
 court must have been affirmed.

Parol evidence that the President of Dartmouth College had ev-  
 er been considered as the President of the school, might have been  
 sufficient; and that such evidence might have been procured, is ap-  
 parent from the act of New-Hampshire, before alluded to. But  
 this act was not in evidence in the present case, and the only pa-  
 rol evidence upon this point was that of Mr. Olcott, who testified  
 that he had no certain knowledge that the several Presidents of  
 Dartmouth College, who have succeeded Dr. Wheelock, exercised  
 the office of President of Moore's Charity School, but that it has al-  
 ways been understood that the charge and control of said school has  
 been exercised by the President of Dartmouth College. The court  
 charged the jury that this evidence, if believed, was sufficient to en-  
 title the plaintiff to recover.

We cannot see, in the testimony detailed, sufficient evidence that  
 Dr. Lord was successor of Dr. Wheelock as President of the school,  
 or that the President of Dartmouth College is President of that  
 school ; and for this reason, the judgment must be reversed, and a  
 new trial granted. It is with some reluctance that we find ourselves  
 compelled to come to this conclusion. ; as the act of New-Hamp-  
 shire, before alluded to, if it had been in evidence, would have been  
 conclusive on this question.

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A deposition may be taken by a justice of the peace in the state of New York, to be used in Vermont.

That the adverse party resided within 30 miles of the place of caption of a deposition, at the time of the *service of the writ*, does not contradict the certificate of the justice, that he resided more than 30 miles distant at the time of caption.

A writ of *habeas corpus*, returned into court and lodged in the files, may be shown by a copy duly certified by the clerk.

That the proceedings of the county court are erroneous, must appear by the record, or they will be presumed to be correct.

No presumption of payment of a bond can arise from *mere lapse of time* of any period short of twenty years.

This was an action on a jail bond, executed in 1808, to the sheriff of the city of Vergennes, for Jabez Fitch, for the liberties of the city prison on an execution in favor of the plaintiff, and assigned to the plaintiff. The defendant pleaded *non est factum* as to the bond and assignment, and several pleas in bar, among which were pleas of payment and of an act of suspension in favor of said Fitch; On all which issue was joined except the last which was demurred to. On the trial of said issues the plaintiff, among other testimony, offered the deposition of Amos W. Barnum, to the admission of which the defendant objected, the same being taken without notice, on the ground that the defendant did reside within thirty miles of the place of caption, and to show this he showed he did so reside at the time of the service of the original writ in this action. No other evidence was offered on either side on this point. The court admitted the deposition. The plaintiff also offered the deposition of one Sickles, taken by a justice of the peace in the state of New York. which was objected to by the defendant, and admitted by the court.

It was conceded that in 1814, Fitch was at large out of the liberties of the prison. The defendant gave evidence tending to show, that as early as the winter of 1809-'10, Fitch escaped from the liberties of the prison. The plaintiff then offered in evidence a certified copy of a writ of *habeas corpus* granted by the supreme court, with the officers return thereon. To this the defendant objected, but the same was admitted by the court.

The defendant's counsel requested the court to charge the jury, if Fitch departed from the liberties of the prison and was publicly and notoriously at large fifteen years or more before the assignment of the bond to the plaintiff, the jury might presume the pay-

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ment of the judgment debt; and further requested the court to instruct the jury that the plaintiff could not recover a greater sum than the penalty of the bond.

The court instructed the jury, that unless the defendant proved that the debtor escaped from the liberties of the prison twenty years prior to the date of the plaintiff's writ, it would not afford such evidence of payment as the plaintiff would be bound to rebut by other proof; but that if the defendant relied upon the lapse of time less than twenty years as evidence from which the jury were to presume payment of the debt, it was incumbent upon him, either to fortify this presumption by proof of other circumstances in the case, which made this presumption probable, or at least to remove all grounds of presumption to the contrary. That the plaintiff would be entitled to recover, if at all, the amount of his judgment debt and interest from the rendition thereof, if that did not exceed the amount of the penalty of the bond and interest on that penalty after breach, though this should bring the amount above the penalty of the bond. Verdict and judgment for the plaintiff, defendant excepted, and the cause passed to this court.

*Upham for defendant.*—The first question arises upon the decision of the court below, in admitting the deposition of Amos W. Barnum. This deposition, we insist, ought not to have been admitted, because it was taken without notice to defendant. At the time of the service of the plaintiff's writ, the defendant lived at Shelburn, within less than thirty miles of Vergennes, where said deposition was taken, and there was no evidence tending to show, that he had changed his domicil, save what appeared from the caption of the deposition.

2. The deposition of Sickles was improperly admitted. This deposition was taken in the state of New York, by a person styling himself a justice of the peace. The deposition should have been excluded; *First*, because a justice of the peace in the state of New York has no authority to take a deposition, and administer an oath to the deponent. And; *Secondly*, because it was not proved that the person who took it, and administered the oath to the deponent, was a justice of the peace, or that he, in any other instance, ever acted as a justice of the peace.

3. The copy of the writ of *habeas corpus* should have been excluded as inadmissible evidence in the case. It is not a writ required to be recorded, and no judicial proceeding is to be had upon it by the court. Consequently a certified copy of it by the clerk of the court, is not legal evidence. Again, it was irrelevant,



and had no tendency to show that Fitch did not escape in 1809 or 1810. CALEDONIA,  
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4. The court should have charged the jury, if they found that Fitch, the judgment debtor, departed from the limits of the jail-yard, and was publicly and notoriously at large, out of the jail limits, fifteen years or more before the assignment of the jail bond to the plaintiff, they might presume the payment of the judgment debt, and return a verdict for defendant. Matlocks  
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In England, and in some of our sister states, I am aware, that twenty years is the time fixed upon for raising the presumption of payment from the lapse of time, where there is no statute limit. But that period was fixed upon in analogy to the statute of limitation, barring the right of entry in twenty years.—*Sumner vs. Child*, 2 Conn. R. 615.—*Moore vs. Cable*, 1 John. Ch. R. 386.—*Demaret vs. Wincoop*, 3 John. Ch. R. 135.

Our statute of limitation bars the right of entry in fifteen years, and the same presumption of payment should arise here, in fifteen years, that arises in England and New York, in twenty years. It has been frequently adjudged in this state, that a right to use water or flow land is acquired in fifteen years. These decisions, I apprehend, were made in analogy to our statute of limitation, barring the right of entry in fifteen years.—1 Vt. R. 54. Why then, should not the presumption of the payment of a bond arise in the same length of time?—See *Sumner vs. Child*, 2 Conn. R. 115. Twenty years is not always required to raise the presumption of payment in those states where the right of entry is limited to twenty years.

In *Jackson vs. Pratt*, 10 John. 381, the court ruled that the jury might presume a mortgage debt paid from the lapse of nineteen years.

In the case at bar, eighteen years elapsed after the escape before the assignment of the bond to the plaintiff, and we think the court should have charged the jury that they were at liberty to presume the debt paid.—*Lesley vs. Nones*, 7 Ser. & Raw. 410.—3 Stark. Ev. 1090, n. 2.—*Ex. of Clark vs. Hopkins*, 7 John. R. 556.—2 Stark. Ev. 310, n. 1.—*Oswald vs. Legh*, 1 T. R. 270.—*Hazard vs. Martin*, 2 Vt. R. 77.—3 Vt. R. 543.—*Rex vs. Stephens*, 1 Brown. 333.—*The Mayor of Hull vs. Horn*, 1 Cowp. 109, 214.—6 Mod. 22.—4 Bur. 1663.—1 Str. 652.—2 Str. 826.—*Willard et ux. Administrator vs. Parr*, 3 Mason's R. 163-4.

There was error, we think, in the court below, in charging the

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jury, that "if defendant relied upon the lapse of any less term of time than twenty years, as evidence from which the jury were to presume payment of the debt, it was incumbent upon him either to fortify this presumption by proof of other circumstances in the case which made the presumption probable, or at least, to remove all grounds of presumption to the contrary." Now, we insist, that after the lapse of eighteen years from the escape to the assignment of the bond, it was incumbent on the plaintiff to account for the delay, before he could recover his debt from the surety on the bond.

In *A Court vs. Cross*, 3 Bing. 329, the court declared that "long dormant claims have more of cruelty than of justice in them, and that christianity forbids an attempt at enforcing the payment of a debt, which time and misfortune have rendered the debtor unable to discharge."

After the lapse of twenty years, unless there are circumstances accounting for the delay, a presumption of satisfaction arises, which is not subject to the discretion of the jury, being a presumption of law.—*Cope vs. Humphries*, 14 Serg. & Raw. 15.—*Oswald vs. Legh*, 1 Tr. R. 220.—*Holcroft vs. Heel*, 1 B. & P. 400.—3 Stark. Ev. 1090, n. 2. But where the defendant relies upon any period of time short of twenty years, the presumption of satisfaction should be submitted to the discretion of the jury.

5. The plaintiff could not recover more than the penalty of his bond, and the charge in this was erroneous.

*W. Mattocks pro se.*—1. The deposition of Barnum, admissible, for the court will not presume the defendant did not remove his residence after service of the writ.

2. The deposition of Sickles admissible, as a justice of the peace by the law of New York, is authorized to take such deposition.

3. The copy of the *habeas corpus* was admissible, because it was a judicial proceeding, and matter of record, proper to meet defendant's testimony.

4. Without qualifying circumstances, twenty years is the least time from which payment of a bond will be presumed.—1 Selwyn 587, note.—Phillips 114.—*Oswald vs. Legh*, 1 Tr. R. 270.—*Cottle vs. Payne*, 3 Day 292.—*Dunlap vs. Bale*, 2 Cranch 186.—*Fonblanque* 266.—*Searle vs. Lord Barrington*, 2 Ld. R. 1370.—3 Stark. Ev. 1089.—1 Bla. R. 532.

5. But whether fifteen or twenty years will raise a presumption

of payment, still this time will not, even in the case of a statute, run against one until he knows of his claim, and cause of action.—*CALEDONIA, March, 1838.*  
 Fonbl. 260-1-2, note.—3 Mass. R. 201.—18 Mass. R. 435.—1 Aik. 232.—1 Selwyn 527, note.

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6. The court will judically take notice by the defendant's plea, that Fitch procured an act of suspension, and that until the decision of *Ward vs. Barnard*, 1 Aik. 121, those acts were supposed sufficient, and this is a sufficient accounting for plaintiff's delay.

7. Plaintiff is entitled to recover the amount of his judgment debt and interest if that does not exceed the penalty of the bond and interest thereon.—1 Mass. R. 308.—2 do. 118.—2 Tr. R. 388.—2 Dall. 253.—4 Dall. 149.—2 Stark. Ev. 1133.—13 East. 343.—4 Cranch. 333.

The opinion of the court was delivered by

COLLAMER, J.—As to the deposition of Barnum, the justice certifies that the defendant resided more than thirty miles from the place of caption. This clearly means *at the time of caption*. This certificate was subject to being contradicted by competent proof, and if so done, the deposition should have been rejected. This is, nevertheless, a mere question of fact, for the county court to decide, whether the certificate is contradicted by such evidence as that court *believe*. It is not obvious how the conduct of that court can be assigned for error on that point, unless by stating the facts and all the facts found by the court. In this case, we do not consider that the fact, that the defendant resided within thirty miles of the place of caption, at the time of the service of the writ, contradicted or disproved the certificate, that he resided more than thirty miles from that place, a year after said service, when the deposition was taken.

As to the deposition of Sickles, it now appears, that a justice of the peace in the state of New York, is by statute, there authorized to take depositions to be used in those states where depositions are admissible.

A copy of a writ of *habeas corpus ad testificandum*, certified by the clerk of the court, before whom the writ was returnable, and in whose files it remained, was admitted, though objected to. If a paper be of that character, that when produced, its *execution* must be proved, then the original must be shown or its loss or destruction proved before a copy is admissible. This writ, is obviously of that public and official character that its execution would not be required to be proved, if produced from the proper public de-

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pository. It was then proper to be shown by copy. Must this be a sworn copy, or may it be a copy attested by the clerk. This writ, was returned into court, and now constitutes a part of the files and muniments of the clerk's office. If this were from another state, it should be authenticated agreeable to the United States statute. It has been the uniform practice of this state so far as we are informed, to admit and even prefer the copy attested by the clerk, not only of *records*, technically so called, but also, of all papers, files, rolls, &c., legally deposited in his office and there required to remain. For instance, all the proceedings and decrees in chancery, though strictly speaking, the court of chancery is not a court of record. This practice, we perceive no occasion to disapprove, considering it furnishing as high a degree of certainty as sworn copies can.

It is however urged, that the paper did not relate to the issue and therefore, was improperly admitted. It is obvious, that the case is not drawn up with reference to such a point. It may have been important testimony for the plaintiff, if the evidence which the defendant introduced, tending to show, that Fitch departed the liberties of the prison in 1809, tended to show he went out under the custody of an officer to give evidence in a cause, at the very date of the return on said writ. This court will always presume the proceedings of the county court to be correct, until the case, on record, shows them to be erroneous. From the present record it is impossible to say whether the testimony was relevant or not. It seems to have been given by the plaintiff as rebutting testimony, but what was the exact testimony which had been put in by the defendant, does not appear, no more than its ultimate tendency. We cannot, therefore say, the proceedings of the county court were erroneous, on this point.

That the lapse of some period of time would naturally lead the mind to the conclusion, that an obligation must have been fulfilled, is extremely obvious. Such a point, must have early arisen and called for some rule of law, or each cause must have been left to the ever varying opinions of the different juries which might try it. The necessity of some time certain being fixed, is apparent. Legislation fixed these periods by statutes of limitation, in most cases, and the courts in others. This, both must do arbitrarily, in the nature of the thing. For though reason demanded that some time should be fixed, she intimated *no particular time*, much less, a different time to each different class of claims. In relation to bonds, for which there is no statute of limitation. the courts fixed the period at twenty years, at which the presumption of payment

will arise and call for explanatory or rebutting proof from the claimant. This has come down to us as a part of the common law, which it is the course of safe precedent to follow. To change it now, especially for pre-existing cases, partakes much of judicial legislation. The defendant's counsel insist, that this period of *twenty years*, was first fixed in England and followed in New York in analogy with the period in which the entry on lands or the action of ejectment was barred by the statute of limitation, and that to preserve the analogy, we should settle upon fifteen years in pursuance of our statute, as to ejectment, as the court have done in relation to presuming grants upon fifteen years user.

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The attempt to sustain the idea of perfect symmetry in our system, is neither a very certain or safe guide in duty. To do this, we must search for analogies often fanciful. In relation to water privileges, ways, easements and incorporeal hereditaments, growing out of, and attached to lands, and in relation to mortgages, tenancies, &c., the analogy to ejectment is obvious; and therefore, in relation to those, the same period of time has been adopted. But it is far from obvious how this *debt and bond* in any way resembles or bears analogy to lands, or has any connexion therewith, in this country. It would seem more to resemble a covenant, for which we have a statute. How the period of *twenty years* was first fixed in England as the time which would create a presumption of payment of a specialty, is not certain. It might there have been considered as connected with land and leaning thereon, because the heir to whom the land descends is bound for *specialty* debts: "So it may be called, though not a direct, yet a collateral charge upon the lands."—(2 Black. Com. 340.) However this may be there, we consider it our duty and most safe to follow the rule as we find it.

It is however insisted, that by law, a period less than twenty years ought, by the court, to have been left to the jury, with instructions that the jury *might* therefrom presume payment. Some cases have been produced as favoring such a principle, especially the case of *Jackson vs. Pratt*, (10 John. R. 381.) That was an action of ejectment, in which the defendant attempted to set up an outstanding mortgage, about forty years old. On this mortgage, some payments appeared to have been made; but for nineteen years, no claim had been made, nor rent paid, nor possession taken, or any step taken to put the mortgage in force; and the judge says, "from all these circumstances, the jury might have been warranted in finding the debt paid." It is undoubtedly true that any

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lapse of time, however short, might be an ingredient in a composition of circumstances, from which a jury might be convinced that a debt was paid. Where there is a statute of limitation, no *period* short of that will, unaccompanied with other circumstances, create a bar, or call for evidence to explain it. Where there is no statute, as in this case, no period short of twenty years has, *alone*, been considered as creating a presumption of payment, or been left to the jury for that purpose. Indeed, so to do, would entirely defeat all benefit from any *certain* rule on the subject, and would leave again each case to the credulity and caprice of differing juries.

Another question arises in relation to the rule of damages: Can the plaintiff recover more than the penalty of the bond, or can interest be cast on that penalty? There appears to have been very great fluctuation in the decisions on this subject.—(They will be found collected in 1 Pow. on Mort. 155, note.) It is to be considered that this is an action against a surety, and not on a bond for the payment of money, but for the jail liberties. The better and more modern opinion seems to be, in relation to such a case, that the penalty is all that can be recovered.—*White vs. Sealey*, Doug. 49—*Brangwin vs. Perreat*, 2 Wm. Black. 1190—*Tew vs. Winterton*, 3 Bro. C. C. 489—*Wilde vs. Clarkson*, 6 T. R. 304.

Indeed our statute, like that of 8 and 9 William III., seems very distinctly to provide that in all actions for penalties, on breach being shown, judgment shall be entered for the penalty, and execution granted for the damages. This implies that the penalty shall not be exceeded. We say nothing how it would be as to a money bond as against principal only.

Judgment reversed for all the damages beyond the penalty of the bond;—affirmed as to the balance.

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#### ELMIRA ALLARD vs. HORACE BINGHAM.

In a prosecution for bastardy, if the complainant becomes *non-suit*, or the proceedings are *quashed*, cost may be taxed for the defendant.

This was a prosecution for bastardy, under the statute of this state, passed November 9th, 1822.

In the county court, non-suit was entered by the plaintiff. Respondent claimed his costs. The counsel for the plaintiff contended that costs were not taxable for respondent. Judgment that respondent recover his costs.

To this decision of the court the plaintiff excepted.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The general statute, which provides that when any person shall cause process to be served upon another, and discontinue the same, or become non-suit therein, the court shall give judgment for the defendant to recover his cost, was sufficient to authorize the county court in this case to tax costs against the complainant. The proceedings, in the case of bastardy, against the putative father, are considered as in the nature of a civil suit, and have always been so treated in this state. Bonds for costs must be given by the complainant in the same manner as on issuing writs of attachment. The providing clause to the second section of the statute relating to bastards and bastardy, does not restrain the court in taxing costs, to those cases only where there is a verdict of a jury. In all cases where the judgment is that the person complained of is not chargeable, or that he be discharged, whether such judgment be rendered on a verdict, or on a demurrer, or on quashing the proceedings for irregularity, cost must be taxed in his favor against the complainant.

The judgment of the county court is therefore affirmed.

*Mr. Fletcher for complainant.*

*Mr. Wheelock for respondent.*

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## ESSEX COUNTY,

MARCH TERM, 1836.

PRESENT, HON. STEPHEN ROYCE, }  
 " JACOB COLLAMER, } *Assistant Justices.*  
 " ISAAC F. REDFIELD, }

## ORLANDO SCHOFF vs. TOWN OF BLOOMFIELD.

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Towns, at the annual March meeting, or at the adjourned term of the same in April, may transact any business within the scope of their corporate interests, whether the subject matter of the business is named in the warrant for the meeting or not.

If at such meeting, a town appoint an agent to compromise a disputed claim for damages on account of a road laid across plaintiff's land by the selectmen, such agent may refer the question of the amount to be paid, to arbitrators; and the town will be bound by the award.

If, after the award, and after the road is legally opened, the owner of the land keep the road fenced up, this does not avoid the award, but the town must resort to their remedy under the general laws, as in other similar cases.

This was an action of debt on an award made by Daniel Smith and George W. Byram, in pursuance of a submission made as hereinafter stated.

*Plea*—the general issue, and trial by jury.

The plaintiff offered the records of the town of Bloomfield of the proceedings of the town at their annual March meeting, in the year 1833, by which it appeared that at the adjourned term of said meeting, Joseph Stevens was appointed agent of the town for the purpose of compromising the difficulties then existing between the town and this plaintiff in relation to a road laid by the selectmen of the town across plaintiff's land.

The defendants objected to the admission of the testimony, for the reason, that in the warning of said meeting, no notice was given of the subject matter of this vote, and that the vote gave no authority to the agent to compromise this difficulty by arbitration; which objections were overruled, and the testimony admitted.



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The plaintiff having proved a submission of their difficulties (which were a claim of damages on the part of plaintiff for the said road being laid as aforesaid across his land,) by said agent and the plaintiff, to the persons above named, and their award in the premises duly made and published, for the sum of \$55 50, and that after the award, both the said agent and plaintiff expressed themselves satisfied with the award, and that the selectmen proceeded to assess a tax for the amount of the award upon the inhabitants of the town, in pursuance of a vote of said town, directing \$30 and as much more as their agent should agree to pay plaintiff in the premises to be so assessed.—The plaintiff here rested his case.

This vote was at the same time with the vote appointing an agent for this purpose,

1. The defendant offered to prove that the land over which the road was laid belonged to the defendant by prescription.

2. That the selectmen had no authority to lay out a road over the land of the plaintiff; and,

3. That the plaintiff had kept the road fenced up since the award.

The testimony was objected to by the plaintiff, and rejected by the court.

The jury were instructed, that if they credited all the testimony given on the part of the plaintiff, he would be entitled to recover. Verdict for the plaintiff.

To the foregoing decisions of the court, the defendant excepted.

*Mr. Wead for defendant.*—The points to be decided in this case are,

1. Has a town power to appoint an agent at an adjourned term of its March meeting, for the purpose of settling difficulties between such town and an individual, without any notice for that purpose in the warning of said meeting?

2. Has an agent, appointed for the purpose of “*compromising*” difficulties subsisting between a town and a third person, power to submit such difficulties to the arbitration of individuals mutually chosen by him and such third person?

3. Did the evidence offered by the plaintiff for that purpose show a sufficient recognizance of the acts of the agent by the town, to bind them?

4. Did the court below err in rejecting the testimony (the award being made to settle a difficulty in relation to laying out a road over plaintiff’s land) offered by the defendant?—1st, That the land over which the road was laid belonged to the *defendant* by prescrip-

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tion.—2d, That the selectmen had no authority to lay out a road over the land of plaintiff—and, 3d, That the plaintiff had kept the road fenced up since the award.

*First*—Towns, like all other incorporations, are confined strictly to the exercise of the powers granted them by the legislature. (1 Swift's Dig. 69.) The "act regulating town meetings, and the choice of town officers," (Stat. 408–9,) authorizes the several towns in this state to make choice of certain officers at their annual March meeting, and to transact such other business as is therein named. Can they travel beyond their charter, and do business without authority?

The act is a public one, which every body is bound to notice; and the powers conferred by it, are supposed to be well known. It gives no authority to appoint an agent; and the freemen of a town might well say they were taken by surprise, if at a March meeting, an agent for any purpose was appointed, without notice in the warning. They cannot know that such business is to be transacted; and, believing that the meeting will confine itself to the exercise of the power granted in the 3d and 14th sections of the act, they may remain at home; while, had they known that *other* business was to be transacted, they would have been present at the meeting.—Such a doctrine is absurd. Ten men might bind the whole town, composed of two hundred voters, without their knowledge, and contrary to their will. With, or without notice, an *annual March meeting* have no power to do *any business* other than what is named in the 3d and 14th sections, unless they first comply with the 15th and 16th sections of the act regulating town meetings.

*Second*—Stevens was a *special agent*. A *special agent*, to bind his principal, must pursue his authority *strictly* (Paley on Agency, 164—Cox Dig. U. S. Rep. 48) in form as well as substance.—5 Mass. R. 37, ——— vs. *Hovey*.—3 T. R. 757—5 John. R. 58, *Nixon vs. ——— et al.*—1 Sw. Dig. 327.

The agent had no authority to arbitrate. The words of his appointment are, "*to compromise.*" He could not delegate his authority and authorize others to settle the difficulty.—Hovenden on Frauds, 1 vol. 177—1 Sw. Dig. 332.

One *partner* cannot submit a partnership difficulty with another so as to bind the firm.—Kyd on Awards, 42.

An *attorney* cannot submit any matter to arbitration for his client without express authority for that purpose.—4 Hayw. (Tennessee) Rep. 65, *Haynes vs. Wright*—2 McCord's Chan. Rep. 406, *Smith vs. Bozzard*, cited in Hovenden on Frauds, 262, 2d vol.—

1 Sw. Dig. 466—1 Ld. Ray. 246, *Bacon vs. Duberry*, misrecited in 1 Swift, 466.

*Third*—The *selectmen* could not recognize the acts of the agent so as to bind the town. *They* were mere agents themselves.

*Fourth*—The court below did err in rejecting the testimony offered by the defendant; and,

1. The submission was a claim of damages for laying out a road over the *plaintiff's* land. If the land belonged to the *defendant*, the arbitrators passed upon a subject not submitted, and the award is void. The defendant offered to show that such was the fact.

2. The statute (p. 427) authorizes the selectmen to lay out roads upon *petition of three freeholders*, &c. If the selectmen had not authority, they were trespassers. Now what was submitted to the arbitrators? A claim for damages for the tortious acts of the selectmen of Bloomfield! And the award was that the town should pay \$55 50, but no release or discharge was awarded.—The plaintiff may sue the *selectmen* at any time, and recover of them for the trespass. If the selectmen were *trespassers*, the town had nothing to submit. The plaintiff could still claim his damages for the road, when it was certified to be open, according to the statute.—1 Saund. R. 327, *Veale vs. Warner*.

3. The defendant should have been permitted to show that the plaintiff had kept the road fenced up since the award. What was the consideration for the \$55 50 awarded? Was it that the town should enjoy the right of using the road, undisturbed by the plaintiff? If so, then the plaintiff was bound to comply with the award; and in fencing up the road, he has deprived himself of any right to recover. On any other ground, the award is void for want of mutuality.—1 Saund. R. *Veale vs. Warner* 327.

Nothing is awarded to the defendant as a consideration for the \$55 50 given to the plaintiff, and nothing but the *right to use the road* can be implied as a *consideration*: so that if the plaintiff interrupts the defendant in the enjoyment of *that* privilege, the only possible consideration that can be imagined has failed. No *release* was awarded, no *right of way*,—no *deed*; and, in short, no consideration ever passed, upon which to base the award.

The plaintiff still has his land—keeps the road fenced up—has his right of action against the selectmen; and if the town attempts, without further authority, to open the road, *he may sue them as trespassers*; or, if the selectmen obtain authority, and proceed legally to open the road, he still has a claim for his damages.

*The award is void.*

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*Mr. Heywood for plaintiff.*—1. The first question in this case is, whether it was necessary in order to the appointment of Mr. Stevens as agent, that the warning of the March meeting should contain the subject matter of the vote.

The appointment of Mr. Stevens was at a meeting in April, adjourned from the annual March meeting.

It is provided by statute, (p. 411, sec. 8,) that all matters and things required to be done at the annual meeting in the month of March, may be done at any adjournment of said meeting in the month of April succeeding.

The statute does not require that the subject matter of any thing to be transacted shall be specified in the warning of the annual meeting.—(p. 408, sec. 1.) This would be a very inconvenient practice, as it would be impossible for the selectmen to foreknow all of the many affairs necessary to be acted on by the town at that meeting. Every inhabitant knows that various affairs of interest to the town will be transacted at that meeting; and if he chooses, he can be present. But when a special meeting is warned, it is provided by the statute that the subject matter to be transacted shall be inserted in the warning (p. 414, sec. 15 & 16); and unless the subject matter is so specified, the business transacted at the meeting is not valid. It is evident from the provisions in the 15th and 16th sections, examined in connexion with the 1st section of the same act, that the legislature did not intend that the subject matter to be transacted, should be inserted in the warning of the annual March meeting of the town.

2. The second objection is, that the vote passed, gave no authority to the agent to compromise this difficulty by arbitration.—The vote was, “that Joseph Stevens be an agent for the town, to compromise with Orlando Schoff about the road going through his land.”

This vote constituted Mr. Stevens an agent, with general and indefinite powers, to compromise the difficulty. It is a rule of law, that powers shall be construed liberally and beneficially. Mr. Stevens was made an agent for the purpose of having the business settled, and if he could not settle with the plaintiff by agreeing upon the damages, the appointment would be a nullity, unless he could arbitrate the difficulty. It was for the interest of the town to have the matter settled without litigation; and to compromise disputes by arbitration, is a method recognized and highly favored by law.

After the award was brought in, the agent expressed himself satisfied with it, which may be equivalent to an agreement by the

agent to pay that sum to settle the matter in dispute, without the aid of arbitrators, which would be clearly within his authority.

The vote of the town, raising \$30, and as much more as necessary to pay the plaintiff, shows that there was a debt of \$30 or more due the plaintiff from the town, and that the verdict in this case is just.

An agent of a town, appointed to prosecute a suit, has authority to refer the suit pending.—*Inhabitants of Buckland vs. Inhabitants of Coventry*, 14 Mass. R. 396.—Pailey on Agency, 425, referred to.—1 Caine's R. 324, *Lyle vs. Closon*.

3. The defendants say that this verdict should be set aside because the court rejected evidence offered to prove that the land over which the road was laid, belonged to the town; and also evidence to show, that the selectmen had no authority to lay out a road over the land of the plaintiff.

This proposition was to go into the merits of the question decided by the arbitrators, and of course could not be admitted.

It is evident that there was a matter in dispute, which was sufficient, though the ownership of the land might be doubtful. And it was of no consequence how illegally the road was laid, inasmuch as it *was* laid, and there arose a difficulty about the damages to be paid to the plaintiff, sufficient to become the subject matter of arbitration. The award must be conclusive, and cannot be overhauled by showing that the arbitrators misjudged.

4. If the plaintiff fenced up or obstructed the highway, it was an offence for which he was liable to be proceeded against under the statute (see p. 433, sec. 16); but it can be no defence to this action that he so obstructed the road.

The highway act, (p. 427, sec. 1,) provides that the selectmen may lay out highways, so that no damage be done to any person through whose lands such road shall be laid, without due recompense from such town, as the selectmen and parties interested shall agree. And if they do not agree, the selectmen are directed to assess and tender the damages before they open the road. From this statute, it appears that the damage is complete, and should be paid before the road is opened. In this case, it appears that the road was laid, and the damage to be paid was fixed by this arbitration; but it does not appear that the road was ever legally opened, and therefore nothing appears why the plaintiff might not legally obstruct the road.

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The opinion of the court was delivered by

REDFIELD, J.—The vote of the town meeting, appointing an agent, is objected to for the reason that the subject is not named in the warning. This was the annual March meeting. For the adjournment to April being provided for by statute, is but a continuation of the same meeting. And all business which may be legally transacted at the stated March meeting, may, by express provision of the statute, be done at the adjourned meeting. And no statute requires that the subject matter of business to be done at this meeting, should be specifically named in the warning. And as the statute does require this in all special meetings of the town, it does, by fair implication, excuse it in reference to the stated annual meeting. At this meeting, it is well known that the town will transact all matters necessary to their corporate interests, and the inhabitants are bound to take notice of that fact, and are bound by the votes of the town, on any such subject, whether they attend or not. Such, we believe, was the contemporaneous construction of this statute, and such has been the uniform practice. This, of itself, would now have the force of law. The subject matter of this agency being a claim of damages for laying out a highway across plaintiff's land by the selectmen of the town, is most clearly within the ordinary scope of the corporate interests of the town.

The next inquiry is, was the submission to arbitration by agent, within the scope of his authority? He was appointed for the purpose of compromising this claim for damages. This compromise he certainly had authority to make in any of the ordinary modes of compromising similar matters. For although he was in one sense a *particular* agent, i. e., to compromise this *one* claim, he had *general* powers, so far as this claim was concerned, and was not therefore in the restricted sense, a *special* agent. He might effect the objects of his appointment in any of those modes, which it is to be presumed the town would have expected him to resort to. Damages had not been assessed to the satisfaction of the plaintiff by the selectmen. He had therefore a right of appeal. On this appeal the question would be settled by the umpirage of a committee selected by the parties and magistrate before whom the appeal was brought. This would of course be in the mind of the town. The appointment of this agent was doubtless to save expense and delay. We think he might "compromise" by agreement with the plaintiff for any less sum than that claimed, or he might agree to pay the same sum claimed. And we see no good reason why he might not resort to any other mode of compromise which must be as benefi-

cial as this by agreement. First, then, he should attempt an agreement as he did. This failing, he might resort to arbitration, which is almost the only other mode of compromising disputed claims, and one so common as must have been in the mind of the inhabitants in conferring the agency. He clearly might refer it, and then agree to give the sum awarded, after he should know it, which was the fact here. And we also consider he might, in the proper sense, refer or arbitrate the matter.—*Inhabitants of Buckland vs. Inhabitants of Coventry*, 14 Mass. R. 396.

The cases relied upon by defendants' counsel as being analogous to this, where it has been held that one partner cannot bind the firm by submission to arbitration, by contract under seal, are not in point. One partner has no implied authority to compromise a contested claim, without consulting the other members of the firm. And never can one man, without a special power, execute a bond for another. Such authority must always be express, and will never be implied. The submission and award so follow and coincide, that the town are bound by the award, unless some fatal mistake or fraud or corruption in the arbitrators can be shown. This is not attempted.

The remaining arguments against the validity of the award, refer to the state of the controversy anterior to the submission. This is now merged in the new contract. And to allow an inquiry into the state of the rights of the parties previous to the submission, with a view to avoid the award on the ground of want of consideration to the contract of submission, would be to avoid every compromise, whether by agreement or award of arbitrators.

If the plaintiff, after the award, still persisted in keeping up his fences across the road, this would not avoid the award, but leave the town to their remedy under the general laws. Indeed, the plaintiff would have a right to keep up his fences until the road was opened in the mode prescribed by statute.—*Patchin vs. Doolittle*, 3 Vt. R. 462.—*Patchin vs. Morrison*, 3 Vt. R. 590.

Judgment affirmed.

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JAMES HASELTON vs. JOHN WEARE.

In a declaration for slanderous words, the words constituting the slanderous charge must be set forth; and an omission to state them is not cured by verdict.

If one of several counts in a declaration is fatally defective, and a general verdict on all the counts is returned and entered in favor of the plaintiff, judgment will be arrested.

This was an action on the case for verbal slander. The declaration contained four counts, the last of which was as follows:—"Also for that, the defendant at said Compton, to wit, at said Guildhall, on the fifth day of June last past, speaking of the plaintiff in a certain other discourse, which the said Weare then and there had, with divers other good and worthy citizens of this state, and of the province of Lower Canada, of and concerning the plaintiff, the said Weare, with the malicious contrivance and intention aforesaid, and for the several purposes aforesaid, did falsely and maliciously, openly and publicly, *charge the plaintiff with the crime of perjury*, in the presence and hearing of those last mentioned citizens. By means of the speaking and publishing of which said several false, scandalous and defamatory words, and of said false and malicious charge. And the plaintiff avers that he is a practicing physician and is further greatly injured and prejudiced in his character, reputation and profession as a physician, and has been suspected and believed by his neighbors and people at large, to have been guilty of the crime of perjury, and by means of the speaking and publishing of which false, scandalous and defamatory words, and of the said false and malicious charge, the plaintiff has lost the confidence of all his neighbors and acquaintances, and also, has lost all his business and practice as a physician as aforesaid, and has likewise undergone great pain and trouble, both of body and mind, and has been otherwise greatly injured and prejudiced, and has been rendered liable to a prosecution for perjury."

After a general verdict for the plaintiff, the defendant moved in arrest of judgment. And the judgment, having been arrested by the county court, the cause was brought here on exceptions taken by the plaintiff to that decision. The motion was predicated, in part, upon alleged defects in other counts of the declaration. But as the decision was founded on the last count, it is not deemed advisable to lengthen the case by any reference to others.

*Wead for the plaintiff.*—1. The doctrine that judgment shall be arrested after verdict for the insufficiency of one of the counts



in the declaration, when there are others that are good, has never been adopted in this state.

It is opposed to sound reason and ought not to prevail.—Cow. R. 276, *Peake vs. Oldham*, per Lord Mansfield Chief Justice. And the same learned judge, in the case of *Grant vs. Asile*, Doug. R. 730, pronounced it absurd, and deeply laments, that so inconvenient and ill founded a rule should ever have been established. In the case of *Bayard vs. Malcolm*, 2 John. R. 550, the chancellor of the state of New York, pronounced the doctrine incorrect, and refuses to recognize it as the law of that state.

2. There is no insufficient count in the declaration in the present case. To charge a man directly and unequivocally with the commission of an act, which if true, would subject him to indictment for a crime, or to ignominious punishment, is a slander for which action will lie; and the words are actionable *per se*, without any *colloquium* or *innuendo*.—5 John. R. 188, *Brooks vs. Coffin*. 1 Swift's Dig. 481.

The court, after verdict, will presume every thing proved, that was necessary to support the action, unless the contrary appear from the record.—1 Salk. 29.—1 Wilson 255, *Budd vs. Steward*.—1 Chit. Pl. 712.—1 Saund. R. 227, note 1, and cases there cited.

The last count in the declaration is sufficient.—8 Mass. R. 122, *Nye vs. Otis*.—1 Chit. 716.

If it were not, *special damage* is set forth in the declaration, and the verdict warrants us in saying, it was proved on the trial.

Whether evidence of such damage was correctly or incorrectly admitted on the trial, is a question not now before the court.

*Argument for the defendant*.—If one count be bad judgment must be arrested.—2 Saund. 307, n. 1.

The defendant moves in arrest of judgment, because the fourth count, being a general count, alleging that the defendant charged the plaintiff with the *crime of perjury*, without setting out the words, is bad.

In actions for slander the words must be set out.—Stark. on Slander 266, 270.—1 Chit. Pl. 381-2.—3 Cow. R. 515, *Fox vs. Vanderbeck*.—3 John. R. 10, *Ward vs. Clark*.—3 M. & S. R. 110, *Cook vs. Cox*.

In actions for libels, it is not enough to allege that the defendant published a libel containing false and scandalous matters, in substance as follows :—3 B. & A. 503, *Wright vs. Clements*.—2 D.

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& E. 162.—6 Taunt. 169.—6 N. H. R. 289, *Parsons vs. Bellows*.—T. Harden, 366.—11 Mod. 78, 84, 95.—2 Salk. 660.—2 Chit. Pl. 304, n.—Com. Dig., action defamation G. 5.—Vin. Abr. title, Libel E.

These words, "*vel consimilia*," would be too uncertain.—Cro. Eliz. 645.

The words themselves must be stated.—3 M. & S. 110.—6 Taunt. 169.—2 John. R. 112.—T. Harden 305.—2 Chit. Pl. 304.

When the declaration consists of several counts and some of them contain words which are actionable, and some of them words that are not so, and no special damages is laid, if the jury find a verdict upon all the counts and give entire damages, judgment will be arrested.—2 Saund. 307, a. n. 1, and cases cited.—10 Rep. 131. c., Osborn's case.—3 Wilson 177, *Onslow vs. Horne*.

The manner of stating special damages.—1 Saund. 343, c. n. 5.

The special damage must be the legal and natural consequence of the words, otherwise it does not sustain the declaration.—1 Saund. 343. d. n. 5.

Such defects are not cured by a verdict.—1 Saund. 227, n. 1.

A verdict will aid a title imperfectly set out, but not an imperfect title.—3 Bla. Com. 393, n. 4, and cases cited.—2 Burr. 1159. 3 Wilson 275.—4 T. R. 472.

The opinion of the court was delivered by

Roxce, J.—Three questions regularly arise in the discussion of this case. 1. Whether the last count in the declaration is originally good and sufficient. 2. Whether, if defective, the defects are cured by the verdict. 3. If it is not aided by the verdict, whether the judgment should be wholly arrested.

The mode of declaring in this count has some resemblance to the ancient declaration—*crimen felonie imposuit*. That was only applicable, however, to a particular case. It imported that the defendant had preferred a criminal accusation against the plaintiff before a magistrate. And hence it was always necessary in such case, to establish that fact in proof. For words merely uttered in discourse such a form of declaring was never recognized.—*Blizard vs. Kelley*, 2 B. & C. 283, *Coleman vs. Goodwin*, there cited in note. It is a rule laid down in all the books, that in an action for mere slander, the words constituting the slanderous charge must be set forth. And to avoid inconvenience from the strictness of this rule, some slight relaxation is permitted in the evidence. This need not correspond in every minute particular with the words as

laid, provided the identity of the charge is substantially made out. The first question is therefore clearly against the plaintiff.

At first view the next point would appear more doubtful. The general rule is, that a title or cause of action defectively stated, will be aided by a verdict, whilst a defective title will not. Where a matter is alleged without those attendant facts and circumstances which properly belong to it, and which are essential to its validity, a verdict establishing that matter, and giving it effect, implies the finding of such attendant facts and circumstances. It shall be presumed in such a case, that neither the court would have left it to the jury to find, nor that the jury would have found, the alleged fact, without proof of these others. Thus if the issue is whether A infeoffed B, and the jury find the feoffment, it shall be intended that livery was proved. So if a grant is alleged without saying by deed, after a finding the grant, it shall be intended to have been by deed, if a deed was necessary.—1 Saund. R. 228 in notes, and by Buller, J., 1 T. R. 145. These illustrations of the rule are doubtless as favorable to the plaintiff as any that the books furnish. They do not, however, remove the difficulty. In each case here referred to the fact omitted was a well known legal ingredient in the main fact or proposition alleged. And if this latter was true in any legal and operative sense the very fact omitted (and not other uncertain facts) must also have existed. This count alleges the assumed legal result of facts which do not appear. It amounts to no more than this, that the defendant said something to the plaintiff, or of, and concerning him, which he interprets as a charge of perjury. And now, after verdict, it is to be understood that evidence was given, which the court below considered had a tendency to prove, and which the jury deemed sufficient to prove, that such an imputation was in fact made. But in what the imputation consisted, and whether in words legally admitting this injurious construction, is not to be ascertained from the record. It follows, that in deciding against the motion in arrest, we should give judgment in favor of the plaintiff, without knowing whether he had a right to recover. Since the actions for oral and written slander are, in most respects, governed by the same rules, the case of *Wright vs. Clements* (3 B. & A. 503) appears to be in point to the present purpose. The declaration stated that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, “*in substance* as follows;” and then set out the libel with innuendoes. This was held bad in arrest of judgment after verdict. And in concluding his opinion, Abbot, Ch. J. says, in reference to the case

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before him—"It is of great importance to follow the ancient form of precedents; for if we depart from them in one instance, one deviation will naturally lead to another, and, by degrees, we shall lose that certainty which it is the great object of our system of law to preserve."

On the whole, as all the authorities and precedents require the words to be set out in the declaration, and as no case is produced showing that this defect is aided by verdict, we come to the result, that a failure to set forth the words is a failure to state any cause of action.

The last question is very easily disposed of. Whilst upon demurrer the plaintiff will be entitled to judgment on any good count in his declaration, though defective counts are included; and whilst in criminal cases the like rule is applicable also to motions in arrest, yet in civil cases, if the declaration contains several counts, and a general verdict is returned for the plaintiff, judgement will be arrested *in toto*, if any one count is fatally defective. The reason assigned is, that entire damages having been assessed upon the whole declaration, they cannot be apportioned by the court among the different counts, nor referred to those only which are good.

In Connecticut, it would seem that this rule has not been adopted.—(1 Sw. Dig. 644.) It is, however, the settled rule in England, in most of the other states, and even in this state. As such, it is binding on the court.—10 Co. 131.—2 Saund. R. 307.—3 Wils. 185.—6 T. R. 694.—Stark. on Slander, 416.—5 John. 430.—8 Mass. 122—9 do. 196—15 do. 374.—*Chipman vs. Cook*, 2 Tyler, 465.—*Bloss vs. Kittridge*, 5 Vt. R. 28.

The effect of such a motion may generally be obviated by having damages assessed on each count separately; and sometimes by correcting the verdict from the judge's notes, and having it entered upon those counts only to which the evidence applied. But no such course is now left, as this could only have been done in the county court.

Judgment affirmed.

## HORACE HALL &amp; Co. vs. CHAPIN K. BROOKS.

Essex,  
March,  
1836.

In an action on the case against a sheriff for neglecting to serve and return an execution, the rule of damages is the amount of the execution, and the defendant cannot be permitted to give in evidence the pecuniary circumstances of the debtor to reduce the damages.

This being an action on the case against the defendant as sheriff of the county of Essex, for neglecting and refusing to levy, serve, collect or return an executing, described in plaintiffs declaration, which is referred to, and judgment having been rendered against the defendant by default, and the assessment of damages being to be made by the court by agreement of parties, the defendant offered evidence to show the situation and circumstances of the debtor in the execution named in plaintiffs declaration, and that at the time of the execution issuing and being put into defendant's hands, as set forth in plaintiffs declaration, the debtor aforesaid was, and still is, wholly irresponsible and unable to pay said execution or any part of it, with a view to reduce the damages in this case. This testimony was rejected by the court on the objection of plaintiffs and judgment rendered for the full amount of said execution and cost. Defendant excepted. Exceptions allowed and certified.

*Cushman and Wead for defendant.*—The defendant contends, that all actions on the case are for the recovery of damages.—1 Chit. Pl. 152.—4 Vt. R. 223, *State Treasurer vs. Weeks*.

What damages are to be recovered? Is it such as have been sustained by the party bringing the suit, or is there something beyond this, that a defendant must account for?—1 Saund. R. 38.—2 Willson R. 295, *Ravenscroft vs. Eyler*.—2 Vt. R. 276, *Iham vs. Eggleston*.—4 Vt. R. 223.—7 John. R. 192, *Russell vs. Turner*.

Suppose the debtor in the execution had been committed to jail; what would the plaintiffs have gained if he was absolutely poor?

It is not alleged that Cheney, (the debtor,) had property on which the execution might have been levied.

The legitimate object of imprisonment in civil cases, is to obtain payment of the debt, and when the debtor has no property, imprisonment becomes a punishment.—1 Vt. Rep. 423, *Town of Middlebury vs. Haight*.

The sheriff cannot be punished in this action for his neglect. The stat. p. 203, sec. 10, points out the course to be pursued for that purpose.

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The statute also, (same section,) provides, that all damages sustained by a party, in consequence of the neglect or refusal of an officer to serve process, may be recovered.

At common law, a plaintiff in an action on the case, can recover no more damage than he has sustained.

What would have been the liability of a sheriff for refusing to execute a *mesne process*.—1 John. R. 223, *Potter vs. Lansing*.—2 Tyler 402.

The debtor in the execution is still within reach of process, and the plaintiffs may have a new writ against him.

The statute provides, that in any action for the escape of a prisoner, the sheriff may give in evidence the poverty and circumstances of the prisoner in mitigation of damages.—Stat. p. 218, sect. 4.

It is difficult to understand how a creditor can be injured to a greater extent by the refusal of an officer to serve a process, than by permitting him to escape after he has been arrested.

*J. Mattocks and Heywood for plaintiffs*.—The only question in this case is whether the evidence offered us, as to the poverty of the debtor in the execution, described in the declaration, was properly excluded by the court?

The object of imprisonment for debt, is to force the debtor to apply his secret funds in payment of the debt upon which he is committed. And if it is to be settled that officers having executions are permitted to neglect their duty and then, to avoid responsibility, may give the poverty of the debtor in evidence, the object of the law must be defeated, because the evidence given of the debtor's poverty will be as to his apparent circumstances, and he may have cash in his pocket and debts due of which the creditor can get no proof.

It is impossible for a jury to assess the amount of damages in this case, so as to be reasonably certain that they do no injustice to the plaintiffs, short of giving a verdict for the damages and costs in the execution.

In this case there was a gross neglect of duty which the law will not protect. There was no step taken by the officer towards performing his duty.

The cases where the poverty of the debtor has been permitted to be given in evidence to mitigate damages, are only in cases of escape. But here was no escape, but a neglect to arrest.

This was decided by the supreme court, at Danville, March Term 1832, in the case *Buckminster vs. Fuller*, not reported. The declaration in that case was the same as the first count in this

case. In that case the county court excluded evidence of the poverty of the debtor, and the supreme court confirmed the decision, as I have copies of the case to show. It is true that that case was not of the magnitude of this, but the defendant thought it of sufficient importance to carry to the supreme court to get his legal rights, and there is no doubt that the court duly considered the case according to the law that must govern all similar cases. This action was brought on the authority of that case, and why should that case be overruled, when in an action of debt the whole amount of the execution can be recovered?

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REDFIELD, J.—In this action, the county court gave judgment for the whole amount of debt and cost in the original execution, notwithstanding the defendant offered evidence to show that the debtor was, at the time of the neglect, wholly unable to respond the amount, or any part of it. If the testimony was relevant, then the judgment is erroneous.

At common law, no such action, as the present, could be sustained against an officer, the only remedy being the process of the rule of court and amercement for contempt. But the action is expressly recognized by our statute, but nothing is there to be found in relation to the rule of damages. But the defendant claims the right of giving the evidence offered, and thus reducing the damages below the amount of the execution, as a universal common law right, in reference to all actions of this character. In actions for escape on *mesne process*, and for refusal to serve *mesne process*, as the debt cannot be transferred to the officer, by the judgment, the rule of damages claimed by defendant in this case has been adopted. But where an officer has final process put into his hands, which he refuses or neglects to receive, it has always been held, that he thereby made the debt his own, and was liable in damages to the full amount of the debt.

The question is not new. It was so held by the court in the case of *Turner vs. Lowry*, 2 Aik. 72, when judgment was rendered for plaintiff to recover the full amount of this execution.

In the case of *Buckminster vs. Fuller*, decided in Caledonia county, March Term 1832, the point now in judgment, was fully considered and decided, as we now hold.

There is a case within the recollection of some members of the court, decided in Franklin county, in which it was held, that the sheriff was liable in an action for escape from the liberties of the

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jail for the full amount of the debt and could not give in evidence either the poverty of the debtor or the solvency of the bondsman at the time of executing the same, they having subsequently become wholly insolvent. These decisions and the long and uniform practice in all our courts of allowing full damage, we think, give to the rule the force of law. That the case is, in some respects, similar to that of an action for escape on *mesne process* is not to be denied. But that is not the same case. If the debtor has once been in custody, the object of imprisonment has been in some measure answered. Imprisonment for debt is only intended to operate to induce a surrender of the debtor's property. If it fails in producing that effect, in the first instance, it will usually always fail. But the case is quite different, when the officer chooses to take the law into his own hands and peremptorily refuses, or what is the same, wholly neglects to serve the process of the court, to which he is bound, and which the creditor has a perfect right to insist upon, we cannot feel that in this view the rule of law here recognized is a hard one. A contrary rule would certainly be very much at variance with sound policy, in as much as it must lead directly to encourage in officers, neglect of duty and tampering with debtors and their friends, which is not within the legitimate scope of their duties.

Judgment is affirmed.



## STATE OF VERMONT vs. The PRESIDENT, DIRECTORS and COMPANY of the ESSEX BANK.

Essex,  
March,  
1836.

The withdrawing of bank stock under the form of loans upon private security, if permitted with intent to reduce the effective capital below the amount required by charter, is a violation of the charter.

But on proceedings had by information for the purpose of vacating the charter, it is not a matter of course that for this cause it will be declared vacated. The power of the court is to be exercised in discretion; and if no existing danger to the community requires it to be exercised, the court will decline to exercise it.

In this case several objections of a formal nature were presented, and passed upon by the court. But as the points decided can very rarely have any application to other proceedings, they are not deemed of sufficient importance to be reported. A trial was then had before the court upon the merits: and after argument,

The opinion of the court was delivered by

ROYCE, J.—This is an information preferred under the 19th section of the “act, to incorporate the President, Directors, and Company of the Essex Bank,” for the purpose of vacating the charter of incorporation. The charges on which the prosecutor relies are the following:

1. That the whole amount of stock was not subscribed before the bank commenced operations. The papers exhibited in evidence furnish an apparent answer to this charge, which is not so framed as to justify an impeachment of the papers, on the ground of any secret trusts among the subscribers.

2. That five dollars on each share subscribed, was not deposited with the commissions in gold or silver coin, at the time of subscribing, nor fifty per cent on the whole capital stock deposited with said commissioners *in specie*, before operations were commenced at the bank. As to the deposit of five dollars on a share the evidence is not decisive either way. The fact is left in uncertainty. And upon the other branch of this charge two questions arise:—1, when the bank should be said to commence operations, with reference to this part of the act; and, 2, whether specie was required in the first instance, to complete the deposit of fifty per centum of the capital stock.

It is evident that the time of commencing operations, which is spoken of in the *proviso* to the 4th section, is not the time when the directors were to commence their official duties. This appears from the latter part of the 3d section, which directs that within ten days after the directors shall enter upon the duties of their office, the commissioners shall deliver to them all the funds

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deposited by subscribers, with a list of the subscribers, specifying the number of shares to which each is entitled. Previous to this the directors could be in no condition to enter upon business transactions. The time here contemplated, is therefore, the time at which the banks should begin to make loans, and incur liabilities by issuing their notes. According to all the evidence they commenced doing this on the 6th day of May A. D. 1833. The deposits on which the respondents rely, as having made up the fifty per centum required, were made on and before the 15th day of April A. D. 1833. And the evidence as to their amount, is satisfactory, provided they were made in such funds as the act required. They consisted, for the most part, in current bank bills, and certificates of deposit, issued by some of the neighboring banks, and made subject to the order and control of these directors.

That part of the act which requires this deposit of one half of the entire stock, is not explicit as to the description of funds to be deposited. The words are—"Provided, That no operations shall be commenced at said Bank, until the number of one thousand shares be subscribed, and fifty per centum of the capital stock be deposited with said commissioners." The prosecutor relies on the 8th section, which regulates the authority of the directors to contract debts, by the amount of specie—deposits on hand, and the amount of capital stock paid in specie into the bank, as furnishing an inference that these deposits on subscriptions were required to be made wholly in specie. But the inference is not a necessary one, nor has it been the practical construction in like cases. It has been usual to accept for these purposes, and even to treat as specie, those available cash funds for which specie might readily be obtained. We think, therefore, that the second charge has not been supported.

3. That a large portion of the stock paid in was withdrawn from the bank before it commenced business. The fact has been fully established, that before the commencement of ordinary business transactions, or immediately upon that event, the stock paid in was mostly returned to the several owners, in the form of loans upon private security. By this means the amount of stock in actual possession, as the basis of corporate responsibilities, was reduced from the sum of twenty thousand dollars, required by the act, to about three thousand. Upon this reduced capital the respondents proceeded to do business, regulating the amount of business with reference to the amount of stock retained. This was little less, in effect, than changing the bank granted, of at least twenty thousand dollars effective capital, to one possessing a capital of but

three or four thousand dollars, with capabilities restricted in proportion. Now it was the prerogative of the legislature not merely to create this institution, but to determine the means it should possess. It was chartered with a limitation of capital at forty thousand dollars, twenty thousand of which were required to be realized as an indispensable qualification for commencing business.— This limitation and this requirement constitute the grand characteristics of the charter. They were such as the public interest and convenience were supposed to require. It is not to be assumed, that in expectation of a greater or less ability to furnish bank accommodations, the charter would ever have been granted. The course on which the respondents entered was therefore an obvious deviation from that contemplated by the act of incorporation. And this ground alone furnishes a sufficient probable cause for instituting this prosecution. It was highly proper that such an apparent perversion of the act should undergo a public investigation.

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4. That in contracting debts the bank has greatly exceeded its proper limits, as prescribed by the 8th section of the act. Suffice it to say on this part of the case, that although the evidence has not proved the abuses complained of, it is calculated to excite those suspicions which might reasonably have influenced the prosecutor.

The power of the court in this case is simply to declare the charter vacated. This power is to be exercised in discretion.— And we think that on the present occasion it ought not to be exercised. It is by no means certain that the respondents intended a fraudulent violation of the act, since they appear to have contemplated a gradual return of the loaned stock, and a considerable portion of it would seem to have been already returned. The business concerns of the bank appear to have been managed with skill and ability, and no existing danger to the community seems to require the destruction of the institution. Another consideration of much weight arises from the character of this proceeding. It is not one in which the court can act as a court of chancery, and bring the affairs of the institution to a gradual close, consulting the safety of creditors and all others concerned. If we act at all, it must be in a summary and final manner. A more just and beneficial remedy may be sought under the general law of A. D. 1831, if the case shall hereafter be found to require it.

Judgment that the charter be not vacated.

*Fletcher* prosecutor for the state.

*J. Mattocks* and *Bell* for the respondents.

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AZARIAS WILLIAMS vs. SAMUEL GODDARD.

A town charter reserved "lands to the amount of one right to be and remain for the purpose of settlement of a minister and ministers of the gospel in said town forever." And directed that this right, and those reserved for the support of schools, and of social worship,—“together with their improvements, rights, rents, profits, dues and interests, shall remain unalienably appropriated to the uses and purposes for which they are respectively assigned, and be under the charge, direction, and disposal of the inhabitants of said township forever.” *Held*, that said right did not vest absolutely in the minister first settled in said town; and therefore, that he could not convey it in fee to a third person.

This was an action of covenant. The declaration counted on the covenant of seisin, and the covenant against incumbrances, contained in the defendant's deed to the plaintiff of a tract of land in Concord. Plea, that the defendant was well seized according to the terms of his covenant, and that the premises were free from incumbrance. The plea was traversed and issue joined.

It appeared, at the trial, that the land described in the defendant's deed to the plaintiff, was part of the ministerial right in Concord, of which the defendant, at the time of executing said deed, claimed to be the absolute owner, as the first settled minister in said town. The evidence showed that previous to the execution of said deed, the defendant was ordained and permanently settled, as pastor of the Congregational Church in Concord, being the first minister ever settled there. It also appeared that the town, by their corporate votes, and through the agency of a committee appointed for that purpose, co-operated with the church in settling the defendant, and voted that he should have the right of land aforesaid, subject to a condition mutually understood and assented to, that he should re-convey a portion of it in a certain event. At the time of executing said deed, and long after, the defendant continued to discharge the duties of a minister under said settlement.

The charter of Concord has a reservation of the usual number of public rights, and in reference to the right in question is worded as follows:—"Lands to the amount of one right to be and remain for the purpose of settlement of a minister and ministers of the gospel in said town forever." And it is declared that this right, as likewise the right for common schools, and for the social worship of God, "together with their improvements, rights, rents, profits, dues and interests, shall remain unalienably appropriated to the uses and purposes for which they are respectively assigned, and be under the charge, direction, and disposal of the inhabitants of said township forever."

The county court instructed the jury, that upon these facts the defendant had not supported the issue on his part, and that the plaintiff was entitled to recover. A verdict and judgment thereupon passed for the plaintiff, and the cause came into this court on exceptions taken by the defendant.

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*W. & J. Mattocks for defendant.*—It is presumed there will be no dispute that the evidence proves the defendant the first settled minister in Concord.

The plaintiff declares that defendant sold to him the right "*granted and reserved to the first settled minister.*"—The evidence proves the defendant such.

How then can the plaintiff be permitted, contrary to his own averment, to say that the defendant took no title; or to raise a question as to what title the defendant took?

The defendant took an ostensible title, and conveyed it to the plaintiff. No person, or set of men, can call in question the plaintiff's title, except the town of Concord: they settled him, and voted him the right.

Towns are not bound to act by common seal: they can act by vote.—*4th School District of Rumford vs. Wood*, 13 Mass. 199.—*Fonblanque*, 243, note.—1 Salk. 192.

The town is estopped from saying they had and conveyed no title.—*Stevens vs. Stevens*, 16 John. R. 115—2 Jacob's L. Dic. 439, 441—5 Dana, 381—2—4 Bacon, 107, &c.—14 Mass. R. 241—2 Tyler's R. 420, *Brown et al. vs. Graham*.

Again: If the charter gives the right to the first settled minister, he takes it by *a due settlement*, without any express vote of the town.

We contend that the first clause is virtually a grant to the first settled minister. At the date of the charter, (1781,) there were no statutes on the subject. The word *settlement* and the *whole* is to be construed according to the *then* state of society and object in view. The New England custom to settle ministers by towns, and for life, is well known. The object and intent were to give the land to encourage and help support a minister when the people were few and poor, to make a farm, or exchange for one. In most cases, the land was in a state of nature, and of trifling value. It would have been mockery to offer a minister the *use* of a wild lot during his *stay*, as an inducement to settle. Here is one right for *use* of a college—one for *use* of county grammar school, to be under the *control and disposal* of the legislature—one for *support* of

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social worship, &c.—one for *support* of English schools—one for settlement of minister, &c.

From the very terms and language, the four first are to raise permanent funds or assistance to support *institutions* or objects.

The last to support a man or more by designation, in a particular situation and temporary.

On the plaintiff's narrow construction, that the town or minister could only take or control the *rents and profits*, in many cases, the right would be worth nothing to *them* or *him*. Suppose it worth nothing for agriculture, but valuable for timber, with privileges or minerals, they or he could not sell or convey the fee; and it would be worth nothing to *either*.

The clause, "together with their improvements," &c. was introduced to apply to gospel and English school rights, but not to *this* right, unless the town think proper to rent it.

Take another view: This case is unlike any known action of the kind. In common actions of *this* description, if defendant does not show title in himself, the law presumes it in some person unknown.

As this right could never be forfeited for taxes, and no one could dispose of it but the town, or this defendant, here can be no such presumption.

We show a *prima facie* title: if there is a better, the plaintiff must show it.

If the town is not strictly estopped, after their acquiescence of 23 years, a court of equity would *enjoin* them against any suit to recover.

And *this* court will be justified in deciding on this principle.

The ordinary reason for a recovery, to wit, the danger of being ousted by a better title, does not apply.

Let the plaintiff recover, he gets his money, and to a *moral* certainty, forever keeps the land.

Contemporaries are better expositors of their instruments than after generations.

Arguments from the general understanding of all concerned, and all community for more than half a century, and practice in perhaps more than fifty like cases, are unanswerable, and equal in reason to judicial decisions, at this late period. But we have one decision in point as to this right, and more against us.—It is this same, *Williams vs. Barker and Hardy*, Essex County September Term, 1821.

Does he come here to defeat his own title, thus established?

It is presumed that decision was founded more on the practical construction of community, than a strict techical construction of the charter.

In all such strong cases, courts have waived *strict law*, to prevent gross injustice, and to avoid disturbing great interests or concerns.

Witness the great landed estate acquired under an illegal vendue of 1797, which the supreme court supported; to wit, Ives' vendue.—4 N. H. R. 20—2 do. 510.

*Hibbard & Fletcher for plaintiff.*—The only question submitted arises upon the construction of that clause of the charter of Concord, reserving a portion of the lands therein granted for pious and charitable uses, creating the trust, and directing its use. If the select men of Concord, the church, and town, could pass an interest in fee, and vest it in the defendant, the charge is erroneous. But if no fee passed and existed by defendant's deed, the judgment will be affirmed.

The lands in question are, and ever have been, wild, unoccupied and uncultivated. No actual possession was ever taken by the defendant, or by any person under him, under defendant's claim of title. The seisin, if any, was a seisin in law, and the question resolves itself into a seisin in fee of fee simple, with lawful right to sell and convey, according to the words of the covenant in the deed. This depends upon the interest the inhabitants of the town had in the land, and the right they and the church at Concord had to pass this interest to the defendant.

What interest had the inhabitants of Concord in the lands in question? Was it an interest in fee simple, and had they lawful authority to sell and convey the same, in manner and form as set forth by the bill of exceptions? This depends upon the construction of the charter of the town. If that grant gives to the inhabitants of the town an estate in fee simple, and the inhabitants were vested with the power to pass so high an estate, and have passed such an estate to the defendant, the covenant of the defendant's deed declared upon is not broken. But if a less estate than an estate of fee simple is granted by charter to the inhabitants of the town, if the power to sell and convey be circumscribed and controlled, and if a less estate is vested in the defendant by the doings of the inhabitants and the church, no estate in fee simple could vest in the plaintiff by defendant's deed, and the covenant of seisin was broken as soon as made.

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Lord Coke says, that a tenant in fee simple is he who hath lands and tenements to hold to him and his heirs forever. That a *fee* is an estate of inheritance, and *simple* is lawful and pure. That the term *heirs* creates the inheritance. That it is simply without restraint.—That it excludes both conditions and limitations.—1 Coke sec. 1, and n. 4.

Chancellor Kent says, that a fee simple is a pure inheritance, clear of any qualification or condition.—4 Kent's Com. 5.

Towns are *quasi* corporations, aggregate or politique, for certain purposes. As such they may purchase and hold lands. A grant of lands to the inhabitants of a county (of course to the inhabitants of a town) creates them a corporation for that single intent. Corporations may be made trustees for charitable purposes, not inconsistent with their institution. They are competent to perform the duties of such trust, and are safe depositories thereof.—2 Kent's Com. 224-5-6.

Courts of Chancery have sole jurisdiction of trusts, unless taken away by charter. The trust cannot be disposed of without the chancellor's order. If the powers of the trustees be restricted by charter they cannot be enlarged by the chancellor's order.—2 Kent's Com. 227-8-30-31. The charter, after enumerating the other grants, declares,—— which, together with the five following rights reserved to the several uses in the manner following, include the whole of said township, to wit:

1. One right for the use of a seminary or college.
2. One right for the use of a county grammar school in said state.
3. *Lands to the amount of one right to be and remain, for the purpose of settlement of a minister and ministers of the gospel in said town forever.*
4. Lands to the amount of one right for the support of the social worship of God in that township.
5. And lands to the amount of one right for the support of an English school or schools in said township.

Which said two rights for the use of a seminary or college, and for the use of a county grammar school or schools, and the improvements, rents, interests, and profits arising therefrom, shall be under the control, order, direction, and disposal of the General Assembly of said state forever.

*Which said lands amounting to the three rights last mentioned, when located, shall, together with the improvements, rights, rents, profits, dues and interests, remain unalienably appropriated to the*



*uses and purposes for which they are respectively assigned, and be under the charge, direction and disposal of the inhabitants of said township forever.*

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The charter here raises the fund—appoints the trust, and designates the uses. Two of the public lots, the college right and the grammar school right, are under the control, order, direction and disposal of the General Assembly of this state forever. The other three rights are for the settlement of a minister or ministers of the gospel—one for the support of the social worship of God, and one for the support of an English school, together with their improvements, rights, rents, profits, dues and interests, shall remain *unalienably* appropriated to the uses and purposes for which they were assigned, and shall be under the direction, and disposal of the inhabitants of said township forever.

The object of this grant is not left to intendment, inference, or construction. The language is too plain to be misunderstood. It is positive, directory and prohibitory, excluding all argument. It directly raises the trust—directs its use, and prohibits its direction to any other purpose.

The language of the charter is, for the settlement of a minister and ministers, in the singular and plural both. The very language creating a succession and continuation, and perpetuating the use.—If it were for the settlement of a minister, it might admit possibly of a different construction, founded upon the rule that when the end for which the trust was raised was attained, the trust ceased.—But even then the funds would lapse and revert to the donor. But here it is plain that upon the settlement of a minister, the trust is not accomplished—is not ended; for the term '*and ministers*' continues it, and that connected with the term '*and that forever*' puts it beyond doubt.

But not only the right of land, but the improvements, rights, rents, profits, dues, and interests are a portion of the trust-fund in contemplation. This is not the language of a grant in fee. This would be to the inhabitants of said township, their successors and assigns forever. It is most obvious if these lands can be alienated, the trust is entirely defeated. But upon this point, the charter is explicit.

The land, and all its accidents, should remain for the purpose of settlement of a minister and ministers of the gospel *forever*.

These purposes are charitable, and for these purposes the inhabitants of the town may be made trustees; for it is not inconsistent

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with their institutions as a body politic or corporate. They are competent to discharge this trust, and may be safe deposits thereof.

The inhabitants may lawfully appropriate the rents, profits, &c. for the uses and purposes declared by charter, and for no other.—They can never *alienate* the trust, for that is declared to be *unalienable*, and an attempt so to do would not only be a violation of the trust duty, but fraudulent and void.

The inhabitants of Concord by charter took no interest in fee in this right of land. They could pass none to Goddard, and no right in fee simple vested by his deed in Williams.

If, at the time of executing his deed to Williams, Goddard had not a title in fee simple to the lands purporting to be conveyed, the covenant of seisin was broken upon delivery of the deed, and the plea in bar cannot be supported.—1 D. Chip. *Bush vs. Whitney*, 369.—2 Vt. R. *Samson et al. vs. New-Haven*, 14.—Stat. 197.

The opinion of the court was delivered by

ROYCE, J.—It is only necessary to consider the first covenant declared on. In this the defendant covenants—"that he is well seised of an indefeasible estate in fee simple." The terms of this covenant necessarily import that he had an absolute estate in fee; and to make good his defence, he was therefore required to establish such a title in himself.—*Gorfield vs. Williams*, 2 Vt. R. 327.—*Catlin vs. Hurlburt*, 3 Vt. R. 403. He was the first minister of the Gospel ever permanently settled in Concord, and no objection is made to the validity of his settlement. The proceedings of the inhabitants of the town sufficiently indicate their intention, that he should receive the right of land in question as an absolute estate in fee. There was indeed a stipulation on his part to re-convey a portion of it in a certain event, but that has no effect upon this case. The whole question must therefore turn on the manner in which this right is granted or reserved in the Town Charter. If it could vest absolutely in the defendant on his being settled, it certainly did so, and his covenant is satisfied: and if it could not so vest, the covenant was at once broken.

There is a diversity in these grants or reservations. In some charters the right is simply reserved for the first settled minister in the town. In others it is reserved for the first settled minister, to be disposed of for that purpose as the inhabitants of the town shall direct. Thus far the land is evidently destined, upon a legal and sufficient settlement of a minister, to vest absolutely in such minister as private property. And whether in each class of reserva-

tions alike, or only in the latter class, it is still requisite that the inhabitants of the town, in their corporate capacity, should in any sense become parties to the settlement, we have no occasion to decide.—See *Sheldon vs. Goodsel*, 1 Aik. 225.—*Dow vs. Hinesburgh and Weed*, 2 Aik. 18.—*Charleston vs. Allen*, 6 Vt. R. 633. The terms of the charter in this instance are different still. The right in question is “to be and remain for the purpose of settlement of a minister and ministers of the gospel in said town forever.” And it is provided that this right, as likewise those reserved for the support of common schools, and of social worship, “together with their improvements, rights, rents, profits, dues and interests, shall remain unalienably appropriated to the uses and purposes for which they are respectively assigned, and be under the charge, direction, and disposal of the inhabitants of said township forever.” This reservation does not purport to be for the settlement of one minister only, but of a minister and ministers, which would include a succession of settled ministers. And that this succession was intended is quite evident, from the terms of perpetuity repeatedly applied to the use, from the perpetual charge and control conferred upon the town, and from the restraint of alienation which is stamped upon the property. The terms employed to direct and secure the application of this property to the purposes expressed, are applied with the like view to two other rights; and these were never understood to be temporary reservations, or capable of being diverted from the objects designated. In short, the language of the charter in reference to this right seems to forbid the supposition, that the estate was to become absolute in the minister settled.

In this view of the case, the members of the court now present are well agreed. But as the court, consisting in part of other members, differed in opinion on a former argument, and as the case of *Williams* (the present plaintiff) vs. *Hardy and Barker*, determined in A. D. 1821, may have involved a contrary decision, some further attention to the subject is required. The record of the case referred to, shows it to have been an action of trespass, in which the plaintiff recovered for trespasses committed on the land in question. It is to be inferred that he had no actual possession of the land, but relied on constructive possession arising from title; and it appears that he made title through the deed of this defendant. The charter of Concord and the defendant's settlement were brought into consideration. The question now discussed might therefore have been determined in that case. But the de-

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cision may as probably have proceeded on a narrower ground, considering the defendant (who then lived in Concord under his settlement) entitled to the possession and enjoyment of the land for the time being, and competent to pass that right by his deed to the plaintiff. As the case has never been reported, and the grounds of decision are consequently unknown, it is not decisive of the whole question now presented. A case is also cited for the defendant from the 2 N. H. R. 510, and another from the 4 N. H. R. 20, showing that in that state the rights reserved by charter for the support of the ministry, and for the support of schools, are regarded simply as appropriations in aid of the respective towns, and subject to their unqualified control and disposition. It was therefore held that those lands might be sold, and converted into other funds, at the discretion of the town. This is directly in conflict with the doctrine uniformly supported and enforced in this state.—*Bush vs. Whitney*, 1 Chip. R. 369.—*Lampson and Barnum vs. New-Haven*, 2 Vt. R. 14. The uses of such reservations are considered as unalterably fixed by the charter, though subject to legislative regulation as to the manner of their enjoyment. And it was adjudged in the case last cited, that the rents and profits to accrue at a distant future period could not be received in advance; since this might defeat the intended benefit to the future generations who may inhabit the town. In our view, the terms of this charter have rendered all these principles conclusively applicable to the present case.

But it is urged, that the course pursued in this instance has been extensively practiced in the state, and ought on principles of policy to be sanctioned. We are not aware of the extent of the practice, but have reason to believe it has not been uniform. The legal construction should therefore prevail. ;

Judgment of county court affirmed.

## ORLEANS COUNTY,

MARCH TERM, 1836.

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PRESENT, HON. STEPHEN ROYCE,  
" JACOB COLLAMER, } *Assistant Justices.*  
" ISAAC F. REDFIELD, }

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JOHN HARDING vs. JAMES CRAGIE.

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To prove that a subscribing witness to a note signed by several signers was in fact only the witness to the first signature, it is not necessary first to call that witness.

Where one count is bad, and the verdict is general, judgment will be arrested.

A declaration in assumpsit, which alleges no legal consideration for the promise, is bad; and a past and executed consideration which is not alleged to have been at the defendant's request, and in no way appears to have been for his advantage, is no legal consideration.

This is a defect not cured by verdict.

This was an action of assumpsit, in three counts,—the first of which was as follows:

"To answer to John Harding, in a plea of the case, for that heretofore, to wit, on the 27th day of June, 1833, in consideration that the plaintiff had before that time, on the 4th day of May, 1833, made, executed and delivered to one Luther B. Hunt, jointly and severally with one Silas Lamb and Philander Reed, a certain promissory note, dated the day and year last aforesaid, for the sum of one hundred dollars, payable to the said Hunt or order, on demand with interest,—he the said James Cragie, by his written memorandum or indemnity, on the said 27th day of June, 1833, undertook and faithfully promised the plaintiff, jointly and severally with Silas Lamb and Philander Reed, that he would indemnify and save harmless the said plaintiff from all damage, costs and expense, which might accrue to the plaintiff in consequence of the signing of said note to said Hunt, and that the said Cragie would pay, or cause to be paid, the said note to the said Hunt without cost, trouble or ex-

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pense to the plaintiff. And the plaintiff avers that he has been damaged and suffered injury to a large amount, to wit, the sum of one hundred and fifty dollars in that behalf; and the said Cragie, his said promise and undertaking not regarding, hath not paid nor indemnified and saved harmless the plaintiff."

The second count was for money lent, and the third for money paid out. Plea, *Non-Assumpsit*.

On the trial in the county court, the plaintiff produced the written contract of indemnity, mentioned in the declaration, purporting to be signed by said Lamb and Reed and the defendant, and the name of Addison Spaulding as witness. The defendant denied the signature of said paper, when the plaintiff offered to prove by said Lamb that said Spaulding was only witness to the first signature on said writing, to wit, the signature of Lamb, but was not witness to the signature of the defendant. To this, the defendant objected, on account of the interest of Lamb, and also because the subscribing witness should be called. The objection was overruled.

The plaintiff offered evidence tending to show, that the plaintiff signed the note to Hunt, upon the promise then made by the defendant, that he would give the plaintiff an indemnity. This was objected to by the defendant, but the objection was overruled, and the evidence admitted. The jury returned a verdict for the plaintiff,—whereupon, the defendant filed his motion in arrest of judgment for the insufficiency of the first count of the declaration, which motion was overruled and judgment rendered for the plaintiff.

The defendant filed exceptions, which were allowed, and the cause passed to this court.

*Starkweather for the defendant.*—1. It is contended that the county court erred in admitting Lamb to prove the execution of the paper offered by plaintiff—First, Because there was a subscribing witness within the reach of process, who should first have been called. For it appears from the instrument produced, that Spaulding, the attesting witness, witnessed the instrument generally, and not for any particular signer. For it is a rule without any known exception, that the subscribing witness must be first called, or his absence accounted for by showing that diligent inquiry has been made for him, and no trace of him can be found: that he is dead, or presumed to be so, when he became party to the suit—was interested in the instrument at the time of its execution, and so continues to be: that he has become blind: that he has been convicted of an

infamous crime, or that he resides beyond the seas, without the jurisdiction of the court, and is not amenable to its process.—2 East. 187-8, *Cunliffe vs. Saxton*.—4 East. 54-5, *Call vs. Dunning*.—7 T. R. 266-7, *Barrows vs. Trompowskey*.—2 East. 250, *Parce vs. Blackburn*.

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And it has been decided in Vermont, that the subscribing witness must be called, though he live out of the state.

But possibly this last decision is adhering a little too strictly to accord with the late decisions upon this point. But certainly there is no necessity nor reason for not applying the rule as laid down in the above authorities to the present case, and a different determination would be manifestly in derogation of an approved maxim of law, "that the best evidence which the nature of the case will admit, shall be adduced."—*Cunliffe vs. Saxton*, 2 East. 186-7.—*Call vs. Dunning*, 4 East. 54-5.—1 Star. Ev. 102, 389.—*Commonwealth vs. Kinison*, 4 Mass. R. 646-7.—3 East. 200-1

Secondly: Where there is a subscribing witness, the parties thereby agree that he shall be the witness.—*Bows vs. Trombouskey*, 7 D. & E. 27.—1 Star. Ev. 102, 389. And when other evidence is resorted to in the first instance, it very justly excites a suspicion of fraud, and manifestly opens a door for the practice of it.

Thirdly: If Lamb could be permitted to testify that Spaulding did not witness the execution of the instrument by defendant, he might swear that he did not witness the execution of any of the signers, and thereby obviate the necessity of his being called in any event; and so of any other instrument, whether executed by one or more, which would be saying, in effect, that if any person could be found who would testify that the witness whose name was attached to the instrument as the subscribing witness was not in fact the subscribing witness, this would supersede the necessity of calling him. Such surely would be a very novel as well as dangerous course. For in a thousand instances a witness might testify mistakenly on this point. There are undoubtedly many instances where the subscribing witness himself would have to refresh his recollection by a view of the instrument, before he could say positively that he *did* witness it. These considerations are deemed fully sufficient without insisting that the evidence relied on was in its nature negative and unsatisfactory.

2. Lamb testified that he had an interest in the suit, and this appears manifestly from the instrument itself. This at least must materially affect his credit as a witness, and thereby render his testimony of far less weight than that of an indifferent person; and

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hence, by so much the more incompetent to testify as to the fact of Spaulding's witnessing the writing produced. If, under any circumstances, Lamb's testimony could be used to prove the execution of the instrument, clearly his testimony was not the proper evidence to pave the way to it.

3. It is contended that the county court erred in permitting the party to travel out of his declaration, and show that plaintiff signed the note to Hunt in consideration of defendant's agreeing to sign an indemnity to plaintiff. For the declaration is a specification in a methodical and legal form of the circumstances which constitute the plaintiff's cause of action.—1 Chit. Pl. 248.—Co. Lit. 17 a. 303.—Bac. Abr. Pleas B.—Com. Dig. Pleader, 67.

And the declaration must allege all the facts and circumstances necessary to the support of the action.—1 Chit. Pl. 255, 303-4.—*Peppin vs. Solomons*, 5 T. R. 498.—*Penny vs. Proctor*, 2 East. 4.—*Rex vs. Neild et al.* 6 East. 422-3.—*Rex vs. Holland* 623.—*Rex vs. Home*, Cowp. 682.

And these allegations must be proved as laid.—1 Star. Ev. 387.—3 Star. Ev. 1526.—1 Chit. Pl. 295.—*McKinchon vs. Hewson*, 7 Term 344.—*Miles vs. Shower*, 8 East. 9.—*Leeds vs. Burrow*, 12 East. 1-3.—*Churchill vs. Wilkins*, 1 T. R. 449.—*Cunningham vs. Kinsland*, 7 Mass. R. 68.—*Baylies vs. ———*, 7 Mass. R. 336.

The reason of this requirement is very obvious. So that defendant may be notified of the ground on which plaintiff urges claim, and be enabled to plead a direct and unequivocal plea, that the jury may know definitely what is submitted to their consideration, and the court, by looking into the record, may clearly comprehend the nature of the action, and be thereby enabled to render such judgment as the case demands. These reasons are too obvious and too frequently insisted on in the authorities to justify further comment before this court. This pretended request or promise of signing an indemnity, was indispensably necessary to legalize this contract. That named in the declaration was entirely passed, and hence utterly incompetent to the supporting of a legal contract.—*Barlow vs. Smith et al.* 4 Vt. R. 144.—*Bloss vs. Kittridge*, 5 Vt. R. 32.—1 Comyn on Con. 19-20.

And for the variance between the declaration and proof, if plaintiff were, on any consideration, permitted to travel out of the declaration, which we have seen is inadmissible, he should be non-suited.—1 Chit. Pl. 303-4.—*Penny vs. Porter*, 2 East. 4.—*Thompson vs. Jameson*, 1 Pet. Con. 311.—*Clark vs. Todd*, 1 D. Chip. 203.



Should the court get over the foregoing objections, it is lastly contended, that judgment must be arrested for the insufficiency of the first count in the declaration. The verdict is general on all the counts,—the evidence had no tendency to support any but the first count. The consideration set forth in said first count, is a part consideration, which will not support a contract.—4 Vt. R. 144, *Barlow vs. Smith*.—*Bloss vs. Kittridge*, 5 Vt. R. 32.—1 Comyn on Con. 19–20.

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The verdict being general, and the first or any count bad, judgment must be arrested.—*Bloss vs. Kittridge*, 5 Vt. R. 32.—*Benson vs. Swift*, 2 Mass. R. 53.—*Stevenson vs. Hayden*, 2 Mass. R. 408–9.—*Kingsley vs. Bill et al.* 9 Mass. R. 200.—*and wife vs. Hurd*, 11 Mass. R. 60.

*Sumner, Cooper & Smalley for the plaintiff*.—This motion in arrest is founded solely on the ground that the consideration set forth in the plaintiff's declaration is a past consideration. This is not a sufficient cause for an arrest of judgment for a 'past consideration may be a good cause for an express promise.—1 Swift, 203.—1 Dane, 119.

All the authorities agree that if this past consideration is for the benefit of the promisor, it is good cause for an express promise, even if it is not alleged to be done at the request of the promisor. If for the benefit of a stranger, or a third person, it is a sufficient consideration for an express promise, if the act constituting the consideration is done at the request of the promisor.—1 Swift, 203, 204.—1 Dane, 119–20–23.—1 Saund. 264, note 1.

If it is shown either that the defendant had been benefitted by this act of the plaintiff constituting this past consideration, or, secondly, that it was done at the request of the defendant, the plaintiff is entitled to recover.

Adopting these principles, to their full extent, we contend that the declaration is sufficient even on a demurrer.

In the first case mentioned, that is, of a benefit derived by the defendant from this act constituting the past consideration, we contend that it is not necessary that this benefit should have been stated in the declaration and spread upon the record.

Our system of pleadings is now sufficiently prolix, and if the benefit derived by the defendant from the act constituting the consideration must be inverted in the declaration, it would become too voluminous and unwieldy to be either used or understood. If it is proved on the trial, it is sufficient: it is all that the law or sound

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policy would have required in guarding the rights of the defendant.

After verdict, it must be presumed that all this has been proved ; and if we refer to the evidence introduced on the trial, it was shown that the defendant was benefitted by the money received of Mr. Hunt for the payment of which the plaintiff became holden.

In the second case mentioned, where a past or executed consideration is a good reason for an express promise ; that is, where the act constituting the consideration is done for a third person, at the instance and request of the defendant, we contend that such a request must be shown on the trial, and need not be alleged in the declaration.—(Chitty, 296.) But either alternative, before supposed, may, and ought to be presumed after a verdict.

But we consider the question as to the sufficiency of the declaration rests now on a motion in arrest of judgment on entirely different grounds from what it would on a demurrer.

In this case, we find an express promise on the part of the defendant to the plaintiff to indemnify him from all loss in consequence of signing this note to Mr. Hunt. Here is also a consideration : the plaintiff has been injured—compelled to pay the note and costs.

It also appeared that part of the money was retained by the plaintiff, and not paid over until this security was obtained from the defendant. And further, that the defendant, Cragie, promised to indemnify the plaintiff before he signed the note to Mr. Hunt.—What then is wanting ? The promise is express,—the consideration is certainly sufficient, if loss and injury to the plaintiff is to be any criterion to determine the sufficiency of a consideration.

But the plains that the consideration “as set forth in the declaration is a past consideration, and wholly insufficient in law.” But is a past consideration always insufficient ? What is a moral obligation, for instance ? a debt barred by the statute of limitations, or a debt contracted by an infant ? Is not this a past consideration, and a good one too, for an express promise ? For all that appears by the motion in arrest, the declaration is sufficient. If there are any latent objections in the declaration, they should be taken advantage of by demurrer. If the declaration had alleged that this act constituting the consideration for the defendant’s promise had been done by the plaintiff at the defendant’s request, or had set forth that the defendant had been benefitted by the act, it would have been sufficient ; and we contend that such niceties must be taken advantage of by demurrer, that a verdict could not have been obtained unless a sufficient consideration had been made out, and by

reference to the exceptions it appears that such a request on the part of the defendant was proved.

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Reason and law dictate that when a party is put to the cost and trouble of prosecuting his cause to a verdict, that many questions shall be considered as settled, which might have been entitled to consideration at the commencement of the suit. If the defendant wishes to exercise his ingenuity in criticising the plaintiff's declaration, he must do it on a demurrer. All questions of form must be taken advantage of by demurrer, and not brought up on a motion in arrest. And not only questions of form, but many questions of substance are considered as settled after verdict.

In the case of *Hitchins vs. Stevens*, reported in 2 Shown, p. 233, Tho. Raymond, p. 287, abridged, in 11 Petersdorff, p. 494, at the top, "It was agreed by the court that in any case where any thing is omitted in a declaration, though it be matter of substance, if it be such as without proving it at trial, the plaintiff could not have a verdict, and there be a verdict for the plaintiff that such omission shall not arrest the judgment.—See also *Rushton vs. Aspinall*, 2 Doug. p. 683, and 11 Petersd. p. 495, at top—*Spiers vs. Parker*, 1 T. R. and 11 Petersd. 495, at top.

But we presume that the court, on a review of the whole case, will consider this as something more than an ordinary case of a promise.

An instrument drawn with all the formality of a bond, is given the plaintiff by the defendant, for his security. Nothing is wanting but a seal to constitute this obligation of such a nature as to preclude all inquiry into the consideration. It is the object of the law to enforce the performance of obligations as they were intended and understood by the parties.

What then was the intent and understanding of the parties? Can there be any doubt that it was the intent and meaning of this writing that the plaintiff was to be at all events saved harmless from all loss in consequence of signing as security the note to Mr. Hunt? By what subtlety is the security to be defeated? Is there such magic in a wafer, that by the omission of it, the intentions of the parties, so clearly expressed, are to be prostrated?

Finally, we trust the court will, by their decision, adopt the opinion of Justice Grose, (8 T. R. p. 131,) "that as this is a motion in arrest of judgment, and therefore every presumption is to be made in favor of the verdict,—at least, nothing is to be presumed against it.

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The opinion of the court was delivered by

**COLLAMER, J.**—The first question in this case arises on the admission of the testimony of Lamb. It seems no dispute existed in relation to the signature of Lamb, nor any that Lamb and Reed were the persons for whose benefit the note was given to Hunt. It therefore appears, that Lamb was equally bound to indemnify both the plaintiff and defendant, and his interest seems, therefore, to have been balanced. As to the subject matter of his testimony, it was to dispense with calling the subscribing witness. It is undoubtedly true, that when the fact proposed to be shown, is a fact to which the subscribing witness was called to attest at the time, such as the signature or delivery of the paper, in such case the subscribing witness was must be first called. In this case it seems there were three signers, and but one subscribing witness. To prove that signatures were added to this paper subsequent to that of the subscribing witness, is not contradicting the above rule, nor is it inconsistent with the face of the paper, but mere matter of explanation.

The next question relates to the admission of the evidence that the plaintiff signed the note to Hunt at the defendant's request, (for such was its legal effect,) when the declaration contained no such averment. On the correctness of this, it is unnecessary to pass. The plaintiff had proved the first count in his declaration without this evidence, and was therefore entitled to a verdict, which was all he obtained. The evidence did not cure a defective declaration, and therefore, it produced no injury to the plaintiff of which he can complain.

When there are several counts and a general verdict is returned, if one of the counts is substantially defective, judgment must be arrested, for the court cannot say, but the jury may have assessed damages on that count. A motion in arrest for the insufficiency of the declaration is to be tried by inspection of the declaration only; no resort can be had to a history of what was shown on trial, to supply any defect in the pleadings. The first count alleges the contract in substance thus; that in consideration the plaintiff had signed a note for certain third persons, the defendant promised to indemnify him. The only consideration here alleged is past and executed, and in such case, it is always necessary both to allege and *therefore*, prove that this was at the request of the defendant, or it must appear, by the declaration, that the defendant derived benefit from the consideration; neither of which are in this count.

—1 Saund. R. 164, note.

The final inquiry is, was this defect cured by verdict? The most ancient rule on this subject, while suits related almost entirely to real estate, was this: A title defectively set out, in pleading, is cured by verdict; but a defective title, that is, a title which upon the pleading was clearly bad, was not cured. This rule is of but little use in application to personal actions. The next rule, by which the courts seemed for a time governed, was this: After verdict, every thing is presumed to have been proved which a court would have required to be shown to entitle the plaintiff to recover.—*Crouther vs. Oldfield*, 2 Ld. Ray. 1225.—*Rushton vs. Aspinwall*, 2 Doug. 684.

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This rule, taken unqualified, would cure every possible defect. But taken in a more limited sense, what will a court require to be proved, and what will they, after verdict, presume to have been proved? The obvious answer would be precisely what is alleged and in issue, and no more.

In *Spiers vs. Parker*, (1 T. R. 145,) it was holden that nothing will be presumed to have been proved but what is alleged or necessarily implied from what is alleged. As when seofment is alleged, livery is implied; or where a trespass or any other act is alleged, a time is implied. This rule has been recognized in this court.—*Vadakin vs. Soper*, 1 Aik. R. 289.

This count shows a mere *nudum pactum*. This does not imply that a legal consideration was shown. There is nothing implying that the plaintiff was ever requested by the defendant to sign the note, or that it was for his benefit.

Judgment reversed.

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T. PIERSON vs. B. GALE and W. J. JOHNSON.

If a judgment be paid on the issuing of the first execution, and the execution surrendered to one of the debtors as evidence of such payment, and he, by advice of a stranger, sue out a second execution, and arrest and commit another joint debtor in the same execution, without the knowledge or consent of the creditor, such debtor and stranger are trespassers.

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If there be no fatal irregularity in the proceedings of a court of competent jurisdiction, however erroneous they may be, all acts done in obedience to their precept will be justified, unless the party act maliciously and without probable cause, and then the remedy is by special action on the case.]

This was an action of trespass for false imprisonment alleged against the defendants.

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In the county court, defendants pleaded *not guilty*, with notice.

On trial, it appeared that in May, A. D. 1833, one Zebulon Lee, of Barre, in the county of Washington, recovered judgment in his favor against the plaintiff and the defendant, Johnson, before Stephen Freeman, a justice of the peace for said Washington county; and that execution issued thereon, and was delivered to the sheriff of Orleans county, to be executed.—That in July, A. D. 1833, and within the life of the execution, in consideration that said Johnson discharged said Lee in respect to another suit then pending between them, Lee agreed to discharge said execution, and accordingly took it back from the sheriff, delivered it up to said Johnson, meaning thereby to relinquish and discharge all claim under said judgment no execution: but no written discharge was entered on the execution, or even signed by said Lee. In September, A. D. 1833, an alias execution issued, and the plaintiff was committed to jail thereon, which was the trespass complained of.

The evidence tended to show, that the defendant, Gale, with the privity and consent of said Johnson, returned said original execution to said justice Freeman—took out the alias, and caused the plaintiff to be committed thereon; and that said Gale was previously well acquainted with said settlement between Lee and Johnson.

There was also evidence tending to show that said Lee did not authorize the taking out of said alias execution; but that the same was procured without his knowledge.

The defendant contended, that as no satisfaction or discharge of said judgment, or first execution, appeared of record, the alias execution was a legal protection to them against this form of action.

But the court instructed the jury, that if they found the first execution actually settled between Lee and Johnson, and given up to the latter as satisfied and discharged—that this was known to both these defendants at the time; and that afterwards, without the knowledge, direction or consent of Lee, the defendants procured the alias execution, and caused it to be put in force against the plaintiff, they were both liable in this action: But if they found all these facts established as to one defendant only, they would find him guilty, and acquit the other: And if said facts were not all established against either defendant, they should acquit them both.

Verdict and judgment against both defendants. To which decision and charge, defendants excepted. Exceptions allowed and certified.

The case was argued by *Starkweather* for plaintiff, and by *Cooper* for defendants.

The opinion of the court was delivered by

REDFIELD, J.—The question to be determined here is, how far final process, sued out after the judgment had been paid, but not released or discharged of record, and *without* the concurrence of the creditor, will operate as a justification to those claiming to act under it. An execution issued to enforce the payment of a judgment after it had been once paid, may, no doubt, be a sufficient justification in trespass to the officer and his assistants. He is never bound to look beyond the process. If that is regular upon its face, it is sufficient for him and all those who act under him. And unless the payment were entered of record, or the fact made known to the clerk, he clearly could not be made a trespasser on account of the issuing of the execution.

But in the present case, the execution had been paid and surrendered to the debtor, as evidence of such payment. The case must be considered the same as if the execution had been released or discharged by the creditor, either upon another or the same paper; and if upon the same, the payment or endorsement erased. In such case, it could hardly be contended, that the second execution could be any protection to the party. It must be admitted on all hands, that if the satisfaction of the execution appeared of record, the clerk even would be a trespasser for issuing a second execution, and this upon the ground that the second execution would be *irregular* and *void*.

But when the payment has not been applied upon the execution, or the execution surrendered to the defendant to be destroyed or kept by him, or some other *unequivocal* act done to indicate the consent of the parties to treat the execution as satisfied, it might be more in accordance with principle, and certainly with decided cases, to leave the party to his remedy, by a special action of *trespass on the case*. Indeed, so closely do the cases upon this subject tread upon the heels of each other, that it is almost impossible to find any satisfactory and intelligible ground of distinction between trespass and case for acts done under *color of process*.

The same act in different states of the American Union, is declared to be, and not to be a trespass. In Massachusetts, it is held, that if an execution issue before the day on which the party by law is entitled to it, the party suing it out is liable in trespass for all injury sustained by the debtor.—*Briggs vs. Wardwell*, 10 Mass. R. 356.

And in the case of *Blaine vs. Charles Carter and Donald*, 4 Cranch, 323, the court wholly disregard such an ex-

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ception, upon the ground that it should be first set aside by application to the court from which the execution issued. Upon the same ground, the court in New-Hampshire refused to sustain trespass where an execution was issued by a justice of peace against the body of the debtor, in a case where by law no such execution could issue.—(2 N. H. R. 491.) And in Maine, precisely the same point was decided just the reverse.—5 Greenleaf, 291.

Where the exemption claimed is mere privilege of the party or court or other body, the party can never sustain trespass for an arrest in violation of the privilege, but must resort to his action upon the case.

In *Wood vs. Kinsman and another*, (5 Vt. R. 588,) it was held that where the debtor was arrested on an execution after having been admitted to the poor debtors' oath, he could have no remedy by action of trespass and false imprisonment. (The same question has been decided otherwise in Maine and some of the other states.)

The distinction then between cases where trespass will lie, and those where it will not lie, are not very distinctly marked.

It is said in the old cases, (*Parsons vs. Lloyd*, 3 Wilson's R. 341—*Barker vs. ——— and Norwood*, do. 376, and cases there cited,) that when the judgment on the writ is irregular, and not merely erroneous, and has been set aside for such irregularity, that all acts done under color of the execution of such judgment or writ, are the same, so far as the party is concerned, as if the judgment or execution had never existed.

The same distinction has been repeatedly recognized in this state, and is no doubt founded in solid, sound sense. If the act is one of judicial discretion, the court is never liable in any form of action for a mere error of judgment. If the court is not liable, surely the party should not be for the act of the court. And the officer is never bound to look beyond the face of the precept or process under which he acts. If that be regular, it is always sufficient for him and for his assistants. And I apprehend, that although it should afterwards be set aside for some irregularity not apparent on the face of it, the officer and his aids could never become trespassers for any act done under the process.

It is equally well settled, that whenever the process is regular, and issues from a court of competent jurisdiction, neither the officer or party are liable in trespass for any mere abuse of the process, however groundless or malicious their proceedings may be, but the appropriate remedy is case.—(*Watson vs. Watson*, 1 Conn. 148.—1 Chit. Pl. 188.) For if the execution has been paid in any col-



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lateral manner, or perhaps in money, but no application made upon the execution, and the party sue out a second execution, he is not thereby a trespasser, but the proper remedy is by *audita querela*, or an action on the case. (*Luddington vs. Peck*, 2 Conn. R. 700, and cases there cited.) The same doctrine is held in the case of *Brown vs. Feeter*, 7 Wend. 301.

But where the payment appeared of record, no doubt the clerk and the party would be liable in trespass, for here the issuing of an execution would be *irregular*, and all persons concerned in issuing it are trespassers. If the application had been once made but fraudulently erased by the party, or if the execution had been paid and surrendered to the debtor as evidence of payment, and then surreptitiously purloined by the party and a second execution sued out, we incline to the opinion that the party must be treated as a trespasser, the same as if he had sued out the second execution while a satisfaction of the first appeared of record, or while the first execution was in the hands of the debtor, and not returned into the office of the clerk. But as that is not the present case, we do not incline to decide it.

But in the present case the execution was sued out by one of the debtors and a mere stranger, and in no sense can these defendants connect themselves with the process, so as to claim protection under it.

They are not the creditors or the agents or attorneys of the creditors, but act wholly without the knowledge and independent of the creditor. A mere stranger who had resolved upon committing a trespass, might just as well purloin a writ from some attorney's office and procure the authority signing the writ, to depute him to serve it, and then claim to have proceeded in the execution of this precept, in which he had no interest directly or indirectly, and over which he had no control.—(5 Wendell 237.)

In *Green vs. Jones*, 1 Saunders 300, it is held, that, to a plea of justification under process, it cannot be replied by the plaintiff that defendant did not do the act *by virtue of the process*, for this is not a traversable or issuable part of the plea. If the party have such process and it issued regularly, all acts done in the apparent execution of it are to be referred to it of course on the ground of legal courtesy, or that charity will put the most favorable construction on a man's acts. But surely the *existence* of the process, and the *manner* of its being prayed out may be put in issue. In this case it is not true that Lee the creditor, sued out this execution,

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nor is it true that the defendants or their agents or attorneys, or as assignees of the debt sued out the writ, for the debt was *extinguished* and not assigned. For this reason then as well as the former, we are satisfied that the execution issued irregularly, and that the defendants have no color of pretence to justify their proceedings under it.

The case of Luddington vs. Peck, 2 Conn. 700, and that of Watson vs. Watson, 9 ib. 140, are certainly very strong cases in favor of defendants; and much stronger than any others to be found in the books. The latter case is one indeed of very questionable authority, and they are not in point. In neither of those cases was any such want of authority shown in the party attempting to justify as in the present. The case of Turnor vs. Folgate, Raymond 70, referred to by Ch. J. Swift, in the case of Luddington vs. Peck, is one which could not be recognized as law here. There the creditor after having sued out and levied one execution, sued out a second execution on the same judgment, and levied it upon other goods with a view to double charge the debtor. In our practice no such thing could happen, unless through the default of the clerk, for the party is never entitled to two executions of the same or different grades, at the same time, but both are the constant practice in the courts of Great Britain; and this is the true reason case was held to be the proper remedy.

The judgment of the county court is affirmed.

AN

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3. An administrator advancing money, in good faith for the estate, and being guilty of no neglect nor unreasonable delay in converting the effects into money, will be allowed interest on his advances.—*Rix Admr vs. Heirs of Smith*, 365

4. So, where he applies for an order of sale, to satisfy a balance due him, which is resisted by the heirs, he will be allowed his services and expenses in closing the trust, provided he succeed in establishing his claim. But if his claim be found unfounded, it is otherwise. *Ib.*

5. The sentence or decree of the probate court is conclusive, as to all matters, which appear from the record to have been actually adjudicated upon. But claims by or against an administrator, which are not brought under consideration in the adjustment of his account, are not concluded by the finding. *Ib.*

6. An administrator settled his account in 1820. In 1832, (the estate not having been fully settled in 1820,) he applied for a settlement of a subsequent account, which was done—upon appeal from the decree of the probate court upon the last adjustment, *held*, that it was not competent to overhaul the settlement of 1820, or to correct any errors occurring therein. *Ib.*

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1. In an action of trespass, *de bonis*, sued at the county court, where the *ad damnum* exceeds one hundred dollars, and the county court refuses to dismiss the action for want of jurisdiction, the value of the property being less than one hundred dollars, this court have no authority to reconsider the decision.—*Learned vs. Bollows*, 79

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tween the debtor and creditor there is no adverse possession.—*Aldis ex. vs. Burdick*, 21

2. If there were an adverse possession it will not render void a conveyance by the marshal of United States, such conveyance not coming within the intent of the statute, avoiding conveyances by reason of adverse possession. *Ib.*

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#### AGENT.

1. A person assuming to act as the agent of another without authority may be made liable on the contract as principal. Or if the nature of the case do not admit of such remedy he may be made liable for all damages by action on the case as for a deceit.—*Clark vs. Foster*, 98

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#### ARREST OF JUDGMENT.

1. If one of several counts in a declaration is fatally defective, and a general verdict on all the counts is returned and entered in favor of the plaintiff, judgment will be arrested.—*Hassilton vs. Wear*, 480

2: Where one count is bad, and the verdict is general, judgment will be arrested.—*Harding vs. Cragie*, 501

See VERDICT, 1.

#### ASSUMPSIT.

1. Assumpsit can be sustained only by that person from whom the consideration moves, and who has the beneficial interest in the contract.—*Warden vs. Burnham*, 390

#### AUDITORS.

1 The chairman of the board of auditors may give notice to the parties of the time and place of meeting, to adjust the accounts. If one of the parties does not appear, a majority of them may adjourn to any other time and place for the purpose of taking the accounts.—*Swinton vs. Erwin*, 282

2. It is not necessary that the auditors should all convene, either for the purpose of giving notice, or of adjourning. *Ib.*

3. It need not appear of record that the auditor was sworn. That will be presumed, unless the contrary appear.—*Putnam vs. Dutton*, 396

4. If the auditor proceeds without evidence to find facts, or if upon incompetent evidence or against all evidence he find facts, this should be shown by the report or by evidence addressed to the county court, if the auditor refuses to report, and in that case the report cannot be accepted. *Ib.*

#### AWARD.

1. Whether it is a good defence, at law, to a suit on an award, that the same was obtained by fraud, *quere*.—*Emerson vs. Udall*, 357

2: If it be, *Held*, that it cannot be avoided by showing merely that a claim presented to the arbitrators, and by them allowed, had been previously paid, and that known to the party. *Ib.*

3. Nothing is available, in this way, except facts, which do not come within the scope of the award, and, from their nature, are not concluded by it. *Ib.*

See TOWNS, 9, 10.

#### B

##### BAIL.

See REDEMPTION, 2.

##### BANKS.

1. The withdrawing of bank stock under the form of loans upon private security, if permitted with intent to reduce the effective capital below the amount required by charter, is a violation of the charter.—*State vs. Essex Bank*, 489

2. But on proceedings had by information for the purpose of vacating the charter, it is not a matter of course that for this cause it will be declared vacated. The power of the court is to be exercised in discretion; and if no existing danger to the community requires it to be exercised, the court will decline to exercise it. *Ib.*

##### BAR.

See BOOK ACCOUNT, 2, 3.

##### BASTARDY.

1. A married woman cannot sustain a prosecution under the statute relating to "bastards and bastardy," for the purpose of compelling the father of a child, begotten and born during the coverture, to contribute to its support, even by showing total want of access of the husband of such woman.—*Gaffery vs. Austin*, 70

2. Such case is one not provided for by statute. *Ib.*

3. A complaint for bastardy must be in writing and be signed and sworn to; but the complaint need not so state.—*Graves vs. Adams*, 130

4. The complaint states that J. G. complains that the defendant did beget a child on one J. G. which is likely to be born a bastard, &c., and then praying process, the same not being signed, was held insufficient. *Ib.*

5. The compromise of a prosecution under the statute relating to bastards and bastardy is a good consideration for a promissory note executed for that purpose by the defendant.—*Holcomb vs. Stimpson*, 141

6. Such a prosecution is a civil suit and may as well be made the subject of a compromise, as any other civil suit, and a promissory note given to effect such compromise, before the birth of the child, cannot be avoided, by showing that the person accused could not have been

the father, unless fraud or imposition, in bringing about the compromise, be also shown. *Ib.*

7 In a prosecution for bastardy, if the complainant becomes *non-suit*, or the proceedings are *quashed*, costs may be taxed for the defendant.—*Allard vs. Bingham*, 470

# BOOK ACCOUNT.

1. In the action on book, a plea which admits the defendant to have been once accountable, though it goes in discharge, is bad.—*Delaware vs. Staunton*, 48

2. Any plea in bar, which puts in issue facts to which the parties may testify, is bad. *Ib.*

3. Therefore, a plea of payment or settlement in bar, is bad. *Ib.*

4. Before auditors, parties are competent to testify to payment. *Ib.*

5. The defendant, in an action on book, may prove by his own oath, that he has delivered up to the plaintiff, in pursuance of an agreement between them, a note which he held against the plaintiff and another, in payment of the plaintiff's account.—*Fassett vs. Vincent*, 73

6. In an action of book account, coming into this court by exceptions, no questions can be reversed except questions of law arising either upon the facts reported by the auditor, or else found by the court, and placed upon the record.—*Putnam vs. Dutton*, 396

7. In an action of book account, sued before a justice of the peace, the want of service on a joint contractor must be pleaded at the first term, and if not so pleaded is waived.—*Pike vs. Blake*, 400

8. The deposition of a party to an action on book, cannot be used as evidence before the auditor. Nor can that of an interested witness be so used. *Ib.*

See CONTRACT, 2, 3.

# BRIDGES.

See TOWNS, 2, 3, 4.

# BY WAYS.

See TOWNS, 2, 3.

# C

# CERTIORARI.

1. The proceedings of the county court in relation to laying out highways and appraising the damages thereby occasioned, can be revised in the supreme court only by *certiorari*.—*Adams vs. Newfane*, 271

# COLLECTOR OF TAXES.

1. The bond, required by the act, relating to particular land taxes, passed Nov. 11, 1807, to be given by the collector, is sufficient, if it be given in double the amount of the tax-bill delivered to the collector, although it be not in double the amount of the whole tax upon the township.—*Spear vs. Ditty*, 419

2. Where the collector's sale was advertised at a particular time and place, and the collector's return states it to have been held in the town and on the day designated, it will be presumed, in the absence of proof to the contra-

ry, that it was held at the precise time and place specified. *Ib.*

3. It is not necessary, that the town clerk certify the volumes, numbers, and dates of the several papers, in which the committee's and collector's advertisements are published; but it is sufficient, if all these particulars appear in his record of the advertisements. *Ib.*

4 It is not necessary that the collector's rate bill should be recorded. *Ib.*

# COMMISSION.

1. When a commission merchant is directed to sell for cash, he is accountable to his employer, if he delivers the articles sold without receiving pay therefor, and cannot be protected by any custom, existing among commission merchants, to deliver such articles and wait for the pay in a week or ten days.—*Bliss et al., vs. Leggett et al.*, 253

# COMMISSIONERS OF JAIL DELIVERY.

1. When the commissioners of jail delivery certify that the creditor is duly notified, their certificate is conclusive.—*Allen vs. Hall*, 34

2. Their decision, on a plea of abatement, cannot be examined in an action against the sheriff for an escape, or on the jail bond. *Ib.*

3. The effect of their decision is the same, when they certify the manner of notice, if they also adjudge and certify that the creditor was duly notified. *Ib.*

# COMPLAINT.

See BASTARDY, 3, 4.

# COMPROMISE.

See BASTARDY, 5, 6.

PROMISSORY NOTE, 5.

# CONDITION PRECEDENT.

1. If A agree with B to pay him the amount of an account due A & B jointly from A & C, the sum to be ascertained by a person named, and to be paid within one year from the date of the bond, the procuring the arbitrator to state the sum due, before the expiration of the year, is not a condition precedent; and if the sum be ascertained before suit brought, but after the term of payment has expired, B may still sustain his action.—*Taylor vs. Gallup*, 340

2. Conditions precedent must appear to be such by the express terms of the contract, or by necessary implication, or they will be held independant covenants. *Ib.*

See CONTRACT FOR SERVICE, 1, 2, 3.

# CONSIDERATION.

1. A declaration in assumpsit, which alleges no legal consideration for the promise, is bad; and a past and executed consideration which is not alleged to have been at the defendants' request, and in no way appears to have been for his advantage, is no legal consideration and is a defect not cured by verdict.—*Harding vs. Cragie*, 501

See ENDORSEMENT, 1, 2.

# CONSTITUTION.

See INDICTMENT, 1.

# CONTINUANCE.

1. A justice of the peace cannot continue a

cause returnable before another justice, under the statute of 1832, who is interested as bail for the prosecution.—*Howe vs. Hoxford et al.*, 220

2. If a justice, who is interested, does continue a cause, and the parties appear at the time and place to which the cause is continued, take a trial on the merits and make no objection on account of the improper continuance. they cannot afterwards move to dismiss the cause for that reason; but the irregularity in the continuance is considered as waived. *Ib.*

3. In case of the absence merely of a justice of the peace, before whom a writ is made returnable, any other justice of the peace present, who can judge between the parties in the case, may take jurisdiction of the cause for the purpose of determining the question of continuance.—*Holland et al. vs. Osgood*, 278

4. This question he shall determine upon the sufficiency of the reason for the absence, but he is himself the sole judge of the question, and his adjudication is final. *Ib.*

5. The second proviso of the act giving this authority, which requires that the second justice shall "enter on the files the reasons" for the continuance, referring as it does to the expression in the body of the act, "by reason of sickness or other cause," would seem to have intended that the justice should enter the "reason of the absence," as far as they were known to him. *Ib.*

6. But in a case where they were not, and could not be certainly known to him, except from inference and presumption, he is not bound to state the presumption or inference in his record, but may state the absence generally and the inference being implied, it is the same as if it were expressed. *Ib.*

7. This part of the act being merely advisory to the justice as to the mode of keeping the record of the proceedings, if it be not strictly complied with, it does not avoid the proceedings. *Ib.*

8. Distinction between those provisions of a statute which affect the *validity* of proceedings, if disregarded, and those which do not. *Ib.*

#### CONTRACT.

1. On a contract for the delivery of manufactured articles of a given description at a given time and place, if the *quantity* specified in the contract and of the same description, although not of the same quality, be delivered at the time and place, and the defendant proceed to use part of the goods and to pay part of the price, without objection until after a question arises as to payment, he will be considered as having accepted the articles and waived all claim for damages, or a reduction of the price stipulated, on account of any open and apparent defects therein.—*Wilkins vs. Stevens*, 214

2. In such case, if the articles be of a kind usually charged on book, although the contract were in *writing*, and payment to be made in specific articles, yet if the term of credit has expired, a recovery may be had in the action of book account, provided the contract is expressed in dollars. *Ib.*

3. In such case, the stipulation being considered as introduced for the use of defendant, if not performed, it is the same here, although not at common law, as if the contract had been originally payable in money, and general indubitatus assumpsit or book account will lie in this state. But if the contract be so far special, that the object of the action is to recover for *breach* of defendant's *promise* rather than the value of plaintiff's part of the performance of the contract, this action will not lie. *Ib.*

#### CONTRACT FOR SERVICE.

1. In all contracts for service, the performance of the entire term is a condition precedent to the right of recovery, and nothing short of an express stipulation to that effect, will enable the party to recover for past performance.—*St. Albans Steam Boat Co. vs. Wilkins*, 54

2. If in a contract for service *by the year*, the undertaker would exonerate himself from service during any part of the term, on the ground of custom, he must show, that such is the general understanding of such contracts. *Ib.*

3. And unless he can show this or some other sufficient excuse, for such absence from the business of the employer, it is an abandonment of the undertaking, and he is not entitled to recover part pay unless he can show, that the employer consented to his return after the absence, and thus waived the forfeiture. *Ib.*

#### CORPORATIONS.

1. A plaintiff, who sues as a corporation, is bound to shew his corporate character, if required.—*Lord vs. Bigelow et al.*, 445

#### COSTS.

1. When a plaintiff prays out a writ, and causes the same to be served, if the officer neglects to return the writ to the justice, no action will lie against the plaintiff at the suit of the defendant for the costs incurred in consequence of such neglect.—*Stevens vs. Wilkins*, 231

See RECOGNIZANCE, 1, 2.

#### D

#### DAYS OF GRACE.

1. B, residing in New-Hampshire, sold to D, at Cambridge, Massachusetts, where D resided, a quantity of cattle, for which D there gave his promissory note, payable in fifteen days. B brought his note to Vermont, where E signed it. *Held*, that E was entitled to three days' grace on this note.—*Bryant vs. Edson*, 325

#### DEED.

1. When two deeds of the same land are executed by A to B, at or near the same time, for the same consideration, and for the same purpose, of the same tenor, but of different dates, and before either deed is recorded, or any further conveyance made or lien created, B gives up to A the deed last executed, to be cancelled, the other deed is not operative between the parties, without some new agreement to give it effect,—something tantamount to a new de-

livery. But if A takes away and destroys said last executed deed, without the consent or authority of B, the other deed shall be allowed to take effect, and be recorded.—*Corliss vs Corliss*, 378

2. Notice of an unrecorded deed is equivalent, as against those having such notice, to a record of the deed. *Ib.*

#### DELIVERY.

See PROMISSORY NOTE, 3.

#### DEMAND.

See VERDICT, 1.

#### DEPOSITION.

1. The caption of a deposition, taken to be used before an auditor, should state the time and place of trial.—*Pike vs. Blake*, 400

2. A justice of the peace in the state of New York, has authority to take depositions to be used out of that state. *Ib.*

3. An alteration of a deposition, by the magistrate taking it, after it is signed and sworn to, and without the assent of the deponent, if it be in any sense material, vitiates the deposition, and it is no longer admissible as evidence.—*Winoskies Turn. Co. vs. Ridley*, 404

4. A deposition may be taken by a justice of the peace in the state of New York, to be used in Vermont.—*Mattocks vs. Bellamy*, 463

5. That the adverse party resided within 30 miles of the place of caption of a deposition, at the time of the service of the writ does not contradict the certificate of the justice, that he resided more than 30 miles distant at the time of caption. *Ib.*

See BOOK ACCOUNT, 9.

#### DEVISE.

1. Under the Probate act of 1797, if lands are devised to A, and he is made executor jointly with B, and all debts due at the decease of the testator together with all specific legacies are paid, A holds the lands as devisee and not as executor, and if a claim accrues afterwards the executor is not responsible.—*Nelson vs. Smalley*, 318

2. An estate devised to two sons of the devisor, creates an estate in common, if there is nothing said in the devisee that the estate shall be joint.—*Gilman et ex vs. Morrill*, 74

3. When one of the devisees dies intestate and under age and without issue, the mother inherits a part of the estate devised to him, with the surviving brother; notwithstanding the will was made and the testator died previous to the passing of the present probate act. *Ib.*

#### DIVISION OF ESTATES.

1. When a division is ordered by a court of probate between the estate of a testator or intestate, and the real estate of another person, in pursuance of the 84th section of the probate act of A. D 1821, if the committee appointed to make such division give the notice to such person, which is required by that section, and afterwards proceed to make the division, their report, when accepted by said court, if no ap-

peal is taken, becomes binding and conclusive upon such person, though the previous notice required by the second proviso to that section be omitted.—*Corliss vs. Corliss*, 373

#### E

#### EJECTMENT.

1. A person who has defended an action of ejectment, commenced against another, claiming the land as his, and where a recovery was had against the defendant, is not precluded from contesting the title of the plaintiff in the ejectment, in a suit in chancery, instituted by him against the same plaintiff.—*Clark vs. Lyman*, 290  
See REDEMPTION, 1, 2.

#### ENDORSEMENT.

1. An endorsement of a negotiable note, directing payment to be made to the endorsee, in unqualified terms, is sufficient to transfer the legal property and right of action, though the words *value received* be omitted in the endorsement.—*Snow vs. Conant*, 301

2. In such case it is no defence to the maker of the note that the endorsement was not founded on a valuable consideration. It is sufficient if the title of the endorsee be not infected with illegality or fraud. *Ib.*

3. If the maker of a negotiable note has become the endorsee of other notes against the payee, and by giving the requisite notice has acquired a right to plead the latter notes in offset to his own, he retains the same right when afterwards sued by an endorsee of his own note. And in such case, no objection to the defendant's title to the notes pleaded in offset can be successfully urged by the plaintiff, which would not have been available to his endorser. *Ib.*

#### EQUITY.

See JUDGMENT, 1, 2, 3, 4.

#### ERROR.

1. That the proceedings of the county court are erroneous, must appear by the record, or they will be presumed to be correct.—*Mattocks vs. Bellamy*, 463

#### ESTOPPEL.

1. A tenant is estopped from denying the title of his landlord, in an action of ejectment brought by the landlord.—*Lord vs. Bigelow et al.*, 445

2. Such estoppel may be given in evidence on trial of the general issue, plead by the tenant. *Ib.*

#### EXCEPTIONS.

1. In proceedings of our supreme court up on bills of exceptions, if there be error in the proceedings of the court below, although substantial justice may have been done, the party excepting is entitled to a new trial as a matter of right, and the court have no discretion to refuse it as they may and will in such

cases, on petition for new trials.—*Irish vs. Cloyes et al.*, 30

## EXECUTION.

See TRESPASS, 1.

FALSE IMPRISONMENT, 1, 2.

## EXECUTOR OR ADMINISTRATOR.

1. The settlement of an executor's or administrator's account, before the court of probate, unappealed from, is conclusive upon every subject adjudicated upon. The heirs, legatees or creditors cannot, in a suit on the probate bond, shew as a breach, that the sale of the real estate was fraudulent and in fact sold to the executor or administrator at less than its value, but should have contested the account of the administrator before the court of probate where the administrator was charged with the amount of sales.—*Probate court vs. Merriam*, 234

2. Such settlement does not preclude the heirs, legatees or creditors from proving that other property came into the hands of the administrator or executor, of which no account is rendered. *Id.*

3. When an executor or administrator is indebted to the testator or intestate, he must charge himself with the amount due from him, if solvent, or it will be a breach of his bond. *Id.*

4. *Quere.* Whether, if the executor or administrator was wholly insolvent, a recovery could be had on the bond for the amount of such debt? *Id.*

See SENIN, 1.

DEVISE, 1.

## EXEMPTION FROM ATTACHMENT.

1. A wooden boot, hung up at the door of a boot and shoe-maker's shop as a sign of his trade, is liable to attachment, like other goods and chattels.—*Wallace et al. vs. Barker*. 440

## F

### FALSE IMPRISONMENT.

1. A mistake in the name of the town in which the jail is situate, in an execution, does not render that execution void, nor the imprisonment thereon, in the common jail of the county, a trespass.—*Lewis vs. Avery et al.*, 287

2. If a person be committed to jail on a sufficient process, that is a defence to an action for a false imprisonment, though he at the same time be committed on an irregular or void process; unless it appears by the pleading or evidence that some inconvenience or injury has occurred to the plaintiff by this void process. *Id.*

### FEME COVERT.

See BASTARDY, 1, 2.

### FORECLOSURE.

1. If the plaintiff in a decree of foreclosure in chancery receives payment of part of the sum decreed, it opens the foreclosure.—*Converse vs. Cook et al.*, 164

## FRAUD.

See AGENT, 1, 2, 3.

## FRAUDULENT REPRESENTATION.

See PROMISSORY NOTE, 1, 2.

## G

### GUARDIAN.

See SELECTMEN, 1.

## H

### HABEAS CORPUS.

1. A writ of *habeas corpus*, returned into court and lodged in the files, may be shown by a copy duly certified by the clerk.—*Mattocks vs. Bellamy*, 463

### HIGHWAYS.

1. Damages were awarded and paid to a person, on account of a road laid out through his land; and said road, before being opened or made, was re-surveyed and altered, on the application of such person, but no part of said road was removed from his land. The report of the committee making such alteration was silent on the subject of damages. *Held*, that these facts alone did not entitle the town to recover back the damages so paid.—*Stiles vs. Middlesex*, 436

2. *It seems* that no part of such damages can be recovered back, by reason of the discontinuance of the road, after it has been opened and used as a highway. *Otherwise*, if it is discontinued and abandoned before it is opened or made. *Id.*

See SELECTMEN, 3.

TOWNS, 2, 3, 4, 8, 9.

### HEIR.

See DEVISE, 2, 3.

### HUSBAND AND WIFE.

See PROMISSORY NOTE, 6.

## I

### IMPEDING PROCESS.

1. If an officer attach personal property in good faith, which in fact did not belong to the person on whose debt he made the attachment, still it is not lawful for the owner of the property even, to resist the attachment, but he must resort to his action at law.—*State vs. Downer et al.*, 424

See INDICTMENT, 5, 6.

### INCUMBRANCE.

See MORTGAGE, 1.

### INDICTMENT.

1. The seventh article of amendment to the United States Constitution, which provides, that in the trial of capital and other infamous offences, the accused shall be entitled to trial upon indictment, has reference to offences cognizable only before the United States courts.—*State vs. Keyes*, 57

2. The pursuing a witness not to attend a public prosecution on the part of the state, although not infamous, is an indictable offence, even where such witness had not been



regularly served with a subpoena, but was known to be a material witness and to be relied upon by the public prosecutor. *Ib.*

3. The attempt to commit such offence, evidenced by distinct and unequivocal acts, is indictable, whether it succeed or not. *Ib.*

4. So the soliciting any one to commit such offence is, it seems, itself indictable. *Ib.*

5. In an indictment against one for impeding an officer in serving civil process, the allegations must show the nature of the process, the manner it was attempted to be served, and the particular mode of resistance. *State vs. Downer,* 424

6. An indictment for an assault and battery of an officer in the execution of his office, as at common law, is good without setting forth the process or the manner of resistance, and may be sustained, notwithstanding the higher penalty superadded to the offence by the statute. *Ib.*

### INTEREST.

1. Interest allowed on a merchant's account when he sells on a credit, after the time of credit has expired.—*Raymond vs. Admr of Isham.* 258

2. No interest allowed on mutual accounts when there is no stipulated period of credit, and when the balance may vary from time to time. *Ib.*

See SCIRE FACIAS, 1, 2.

ADMINISTRATORS, 3.

### IRREGULARITY OF PROCESS.

1. If there be no fatal irregularity in the proceedings of a court of competent jurisdiction, however erroneous they may be, all acts done in obedience to their precept will be justified, unless the party act maliciously and without probable cause, and then the remedy is by special action on the case.—*Pearson vs. Gale et al.,* 509

See FALSE IMPRISONMENT, 1, 2.

### J

### JUDGMENT.

1. If a judgment be rendered in pursuance of an agreement of the parties which directs a particular mode of satisfying it, equity will not permit it to be enforced in any way inconsistent with the agreement.—*Nason et al. vs. Smalley et al.,* 118

2. If one of two executors fraudulently consent to a judgment against both, the other executors will be relieved in equity—and if the judgment operates as a fraud upon the estate it will be enjoined absolutely. *Ib.*

3. And this although the judgment creditor was not privy to the fraud, if he be a trustee merely for the party to the fraudulent agreement. *Ib.*

4. In this case the judgment creditor was an administrator, and the judgment was rendered by agreement between one of the defendants, and a person interested in the estate represented by the plaintiff. *Held,* that if the other persons interested in the estate sought to enforce the judgment, they were subject to all equities arising out of the agreement. And inasmuch as the court of law did not examine the merits of the claim, the court of equity will do so, and if they find it not equitable—they will not permit it to be enforced either against the defendant who did not in fact assent to it nor against the estate which the defendants represents. *Ib.*

See TAXES, 1.

### JURISDICTION.

1. When a plaintiff sues before the county court for a certain number of penalties, in all amounting to over one hundred dollars, and on trial gives evidence only of a number not amounting to that sum, and there is no evidence tending to prove any more, or that any more had been incurred, the county court should dismiss the cause for want of jurisdiction.—*Putney vs. Bellows,* 272

### JUSTICE OF THE PEACE.

See CONTINUANCE, 1, 2.

### L

### LEVY OF EXECUTION.

1. A substantial compliance with Judge Chipman's forms of levy of an execution on real estate is sufficient to pass the title, and a literal compliance will not be required.—*Aldis Ex'r vs. Burdick,* 21

2. The creditors of one of a firm, may set off on execution his share of the real estate, held by the firm, if it is not made to appear that the creditors of the firm will be injured thereby.—*Clark vs. Lyman,* 290

3. Such a levy will be held good, unless the creditors or the other members of the firm take some measures to have the interest of the debtor ascertained, before the levy is made. *Ib.*

4. The form for an officer's return of a levy of real estate, promulgated by Judge Chipman, has been frequently adjudged sufficient.—*Day et al. vs. Roberts,* 413

5. "Good and lawful freeholders" imports "disinterested." The case of *Prince vs. Dodge*, 4 Vt. R. 191, and *Seymour's adm'r vs. Beach*, 4 Vt. R. 493, distinguished. *Ib.*

### LIMITATION.

1. The statute of limitation does not run upon a judgment, while the judgment debtor is imprisoned on the execution; but begins to run, upon the discharge of the debtor, under the act for the relief of poor debtors.—*Ferries vs. Barlow,* 90

2. Such a case is within the statute, and the action of debt is barred after the lapse of eight years from the date of such discharge. *Ib.*

3. The act of the Provincial Parliament in Lower Canada, passed in 1793, declaring that suits shall be brought on promissory notes

within five years, or shall be considered as paid and discharged if the debtor makes oath that the same is paid, is considered as a statute of limitation, or a statute prescribing a mode of proof, and as such has no force in this state. The statute only effects the remedy and not the contract.—*Cartier vs Page*, 146  
See *SCIRE FACIAS*, 2.

## M

## MORTGAGE.

1. When a purchaser of an estate, incumbered by two mortgages, at the time of the purchase, agrees with the mortgagor to pay the mortgages, and retains a part of the purchase money for that purpose, and goes into possession, he cannot afterwards take a conveyance from the first mortgagee, and set it up against the second mortgagee, notwithstanding he may have been deceived by the mortgagor as to the amount due.—*Converse vs. Cook et al.*, 164

See *REDEMPTION*, 1.

*PLEDGE*, 1.

## MOTION IN ARREST.

*Quere*, Whether a motion in arrest can be sustained when the trial of an issue in fact is by the court.—*Bliss et al. vs. Leggett et al.* 252

## MOTION FOR JUDGMENT.

1. A motion for judgment, notwithstanding a verdict for the other party, is necessarily founded on the record alone, and can never depend on any state of evidence which is not disclosed by the record.—*Snow vs. Conant*, 301

## O

## OFFSET.

1. Where B. owed D., both on note and book, D. commenced two suits, one on book and one on note. B. filed a declaration in offset on book to the action of D. on note, *Held*, that, in such case, B. could not apply his account on the note in this manner.—*Davis vs. Barton*, 246

2. If an action on contract is commenced against A and B, but, in consequence of a return of *non est inventus* as to B, is entered and prosecuted against A only, he may plead in offset a demand due to himself alone.—*Snow vs. Conant*, 301

## P

## PAROL EVIDENCE.

1. Parol evidence is admissible to contradict, vary, or add to a written contract.—*Bradley vs. Bentley*, 243

## PARTIES' TESTIMONY.

See *BOOK ACCOUNT*, 4, 5, 6.

## PAUPERS.

1. No obligation rests upon towns, aside from the provisions of the statute to sustain

their poor, nor can they be compelled to pay for the necessary support of an acknowledged pauper, unless by express contract with them in their corporate capacity, or with the overseers in the mode pointed out by statute.—*Castleton vs. Miner et al.* 309

2. Where an order of removal of a pauper had been made, and the pauper removed, but the time for taking an appeal had not transpired; it is competent for the overseers of the poor of the two towns, by mutual consent, to abandon the said proceeding, take back said pauper, and thus place all things as if said order had not been made.—*Pawlet vs. North Hero*, 196

## PAYMENT.

1. An endorsement of part payment upon a written contract, when it is proposed to be used for the purpose of rebutting a presumption of payment of the balance, can have reference only to the time such part payment purports to have been made.—*Hayes vs. Morse*, 316

See *FORECLOSURE*, 1.

*TRESPASS*, 1.

## PENSIONER.

1. The money of a pensioner, in the hands of his agent, or attorney, appointed to receive his pension from the disbursing agent, and received on that account, is not liable to a trustee process.—*Adams vs. Newell et al.* 190

## PLEDGE.

1. Distinction between a mortgage and a pledge. A mortgagor of a personal chattel cannot sustain trover against his mortgagee, unless the chattel be redeemed.—*Wood vs. Dudley*, 430

## POSSESSION.

1. A delivery of property to another, to be paid for at a given price, and to become his, upon condition that the price be paid, is not fraudulent as against the creditor of the vendee.—*Bigelow vs. Huntley*, 150

2. And in case it be attached by the creditor of the vendee, before condition performed, the vendor will hold the same against the attaching creditor. The vendor has a right, in such case to determine the bailment, and resume the possession. *Id.*

3. And, although a specific time is given for the payment of the price, which has not expired, yet, if the property be attached, upon process against the vendee, and the vendor receipt the same to the officer, he becomes entitled to the possession, and may maintain trespass or trover against a subsequent attaching creditor of the vendee, who takes the property from his possession. *Id.*

4. In such case, the right of possession being in the vendor, though only as receiptor, the rule, that the plaintiff cannot recover when he has not the right of possession, does not apply. *Id.*

5. Where personal property, when sold, is in the possession of a third person, and that person is fully informed, both by the vendor and vendee of the property being sold, this is a sufficient change of possession to protect it from the creditors of the vendor.—*Pierce vs. Chipman*, 334

6. The purchaser of a chattel committed it to the keeping of a third person, who suffers it, without the knowledge or consent of the purchaser, to go back into the possession of the vendor, when it was attached by his creditor. *Held*, that the creditor might hold the chattel.—*Emerson et al. vs. Hyde*, 359

7. The law requires such change of possession, as indicates to the world at large a change of ownership; and if such possession is not taken by the purchaser, it is no excuse that he entrusted the chattel to another, who was negligent or unfaithful, *Ib.*

#### PRESENTMENT.

1. If a note be made payable at a particular place, a presentment and demand are not necessary to entitle the holder to recover against the maker.—*Hart et al. vs. Green*, 191

#### PRESUMPTION.

1. A presumption against the title of the mortgagee, arises from mere lapse of time, in favor of a stranger.—*Appleton vs. Edson*, 239

2. Where the possession has been vacant, courts will not presume any thing against the legal estate, *Ib.*

3. No presumption of payment of a bond can arise from mere lapse of time of any period short of twenty years.—*Mattocks vs. Belamy*, 463

See PAYMENT, 1.

#### PRINCIPAL AND SURETY.

1. A promise by a principal to pay into the hands of his surety, for his indemnity, the amount for which the surety has become accountable, whenever the latter shall be called on for payment by the creditor, or shall have reason to doubt the ultimate ability of the principal to save him harmless, is a valid promise, on which an action may be sustained by the surety; and it is not a prerequisite to an action, founded on such a promise, that the surety should have paid the debt, or any portion of it.—*Fletcher vs. Edson*, 294

#### PROBATE COURT.

See ADMINISTRATORS, 4, 5, 6.

DIVISION OF ESTATES, 1.

#### PROMISSORY NOTE.

1. A party may recover upon a promissory note which has been voluntarily given up to be cancelled.—*Reynolds et al. vs. French et al.*, 85

2. If a debtor, by false and fraudulent representation, as to his situation, induce his creditor to deliver up to him his promissory notes upon payment of a part only of what is due, the creditor may, upon proof of the fraud, recover the balance of his debt in an action on the note, *Ib.*

3. Delivery is essential to the validity of a promissory note.—*Chamberlain vs. Hopps et al.*, 94

4. The maker of a promissory note takes it from the holder, for the purpose of obtaining the signature of a surety. Another signs as surety, but the principal refuses to redeliver the note. The surety is not liable to a suit on the note. *Ib.*

5. When a promissory note is given to compromise a contingent liability, the note can never be avoided by showing that the maker of the note was not in fact or in law liable.—*Holcomb vs. Stimpson*, 141

6. A promissory note, executed by a husband to his wife, during coverture, is void, and cannot be enforced, even for the benefit and in the name of a third person, to whom the husband has afterwards promised to pay it.—*Sweat vs. Hall*, 187

#### Q

#### QUANTUM MERUIT.

1. In the case of labor performed on land, under a special contract, but not strictly according to the terms of the contract, if it be of some benefit to defendant, the plaintiff may recover on a quantum meruit, as much only as the labor is worth to defendant.—*Dyer vs. Jones*, 205

#### R

#### RECEIPTS.

1. If an officer attach property, and bail it to a receipt man, who refuses to redeliver it on request, he may sustain trover against such receipt man.—*Sibley vs. Story*, 15  
See POSSESSION, 2, 3, 4.

#### RECOGNIZANCE.

1. A recovery may be had on a recognizance, entered into in court for the prosecution of a suit there pending, &c., although the suit may have been dismissed for want of jurisdiction, if cost was taxed for the defendant in the suit agreeably to the provisions of the statute.—*Colony vs. Maack*, 114

2. The court had jurisdiction of the suit for the purpose of taking such recognizance, also of rendering judgment on the plea to their jurisdiction, and of rendering judgment for cost, *Ib.*

#### RECORD OF DEEDS.

1. When a town clerk copies a deed delivered to him for record on a book which has ceased to be a book for recording for a number of years, and does not insert the names in the alphabet, for the purpose of concealment and fraud, such deed is not recorded, and is no notice to after purchasers, or attaching creditors.—*Sawyer et al. vs. Adams*, 179  
See DEED, 1, 2.

#### REDEMPTION.

1. The plaintiff in ejectment on mortgage, when defendant obtains a decree of foreclosure.

sure and time to redeem, is entitled to take his writ of possession and execution for costs on the expiration of the time set for redemption, and the terms of the decree not complied with.—*Emerson et al. vs. Washburn*, 9

2. The day of the expiration of the time set for redemption, is the day of final judgment; and the day following, being the first day on which plaintiff is entitled to execution, is the first of the sixty days within which plaintiff must aver a *non est inventus* return on the same in order to charge bail on *meine process*, 1b.

3. The bail in such case are not discharged by the operations of the decree either on the ground that it extends the time more than sixty days from the rendition of final judgment, or that the costs are merged in the decree, 1b.

### REFERENCE.

1. The court have no power, without the consent of the parties, to enlarge a rule of reference.—*Rice vs. Clark*, 104

2. In a case referred by agreement of parties, it is no ground of setting aside the report that the referees admitted irrelevant or illegal testimony, if it had no tendency to mislead their minds, and did not in fact mislead them.—*Learned vs. Bellows*, 79

3. Reports of references are not to be set aside for every circumstantial error, but only where they adopt a rule of action and misapply it; and in this respect it is immaterial whether it be a rule of law, or of equity, or of arithmetic, 1b.

### RELEASE.

1. A general release of all "demands, notes and accounts," will not be construed to include a suit pending, especially when, from testimony *alunde*, it appears such was not the intention of the parties.—*Learned vs. Bellows*, 79

### RETURN.

See **LEVY ON EXECUTION**, 1, 4.

### ROADS.

See **TOWNS**, 2, 3, 4, 8, 9.

**HIGHWAYS**, *passim*.

### S

### SCIRE FACIAS.

1. If a plaintiff bring *scire facias*, and receive a judgment, he obtains no interest, nor can he ever afterwards revive that claim for interest.—*Hall vs. Hall*, 156

2. If part of a judgment be apparently satisfied by a levy of record of the execution on real estate acquiesced in by both parties, and the balance of the judgment be revived by *scire facias*, and afterwards the levy be declared void, the amount of the levy may be revived, and the statute of limitations will only run from the time of the levy being declared void, 1b.

See **ADMINISTRATORS**, 2.

### SCHOOL DISTRICTS.

1. The statute in relation to erecting or altering school districts, requires that they should be defined by geographical limits, and be made to consist of territory and not of persons.—*Gray vs. Sheldon*, 402

### SEISIN.

1. If an executor or administrator declare on his own seisin, in an action of ejectment, he must prove his appointment as a part of his title, but not so where he declares upon the seisin of his testator or intestate.—*Aldis Ex'r vs. Burdick*, 21

### SELECTMEN OF TOWN.

1. When a person is committed to jail, and remains within the same, or within the limits, who is subject to have a guardian appointed over him, as a spendthrift, under the 14th section of the statute in relation to settlement and providing for the poor, the selectmen and civil authority of the town where the jail is situate, may make the complaint for that purpose, if such person has no legal settlement in the state.—*Cushing vs. Hale*, 38

*Semb.* The selectmen and civil authority of any town where such person resides, may make such complaint, 1b.

2. If such complaint recites that it was made by a majority of the selectmen and civil authority, and the magistrates act thereon, it is *prima facie* evidence that it was made by such majority, 1b.

3. The selectmen of a town have no power to discontinue a road, laid by the road commissioners, or a committee appointed by the legislature or supreme or county court.—*State vs. Shrewsbury*, 223

4. The selectmen and overseers of the poor cannot make a contract obligatory on the town, for the support of a person having a settlement therein, for a greater sum than five dollars, without an order from a justice of the peace, in pursuance of the 20th section of the statute in relation to settlements, and providing for the poor.—*Ives vs. Wallingford*, 224

### SETTLED MINISTER.

1. A town charter reserved "lands to the amount of one right to be and remain for the purpose of settlement of a minister and ministers of the gospel in said town forever." And directed that this right, and those reserved for the support of schools, and of social worship,—“together with their improvements, rights, rents, profits, dues and interests, shall remain undeniably appropriated to the uses and purposes for which they are respectively assigned, and be under the charge, direction, and disposal of the inhabitants of said township forever.” *Held*, that said right did not vest absolutely in the minister first settled in said town; and therefore, that he could not convey it in fee to a third person.—*Williams vs. Goddard*, 492

### SETTLEMENT.

See **SELECTMEN**, No. 1, 2.

**SHERIFF.**

1. A deputy sheriff cannot serve a writ in favor of a town of which he is a rated inhabitant.—*Fairfield vs. Hall*, 68

2. The sheriff of another state cannot pursue and retake a prisoner who has escaped from his custody, on civil process.—*Bromley vs. Hutchins*, 194

3. The liability of an officer, for having neglected to levy an execution, confers no interest in the judgment debt, nor any right to control or discharge it. Therefore, the proof of such liability alone is not admissible in support of a plea alleging that the officer was interested in the demand.—*Fletcher et al. vs. Crooker et al.*, 314

4. Nor is it a ground for reversing a judgment of the county court on exceptions, that they rejected evidence offered to prove, in support of such plea, that the officer had procured a second judgment to be recovered against the debtor, and a new execution to be issued; since it does not necessarily result from this that he acquired any interest in the debt, or even made any disbursements, *Ib.*

**SLANDER.**

1. In a declaration for slanderous words, the words constituting the slanderous charge must be set forth; and an omission to state them is not cured by verdict.—*Hassleton vs. Weare*, 480

**SURETY.**

See PROMISSORY NOTE, 4.

**T**

**TAXATION, EXEMPTION FROM.**

1. A citizen of Vergennes liable to taxation by reason of his property, does not acquire an exemption from taxation, or arrest for payment of taxes by enlisting into the army of the United States.—*Webster vs. Seymour et al.* 135

**TOWNS.**

1. If an overseer of the poor, in binding out to apprenticeship a child chargeable to the town, covenant that such child shall faithfully serve out the term, the town is not liable for the breach of such contract.—*Baldwin vs. Rupert*, 256

3. Towns are bound to repair injuries to roads and bridges as soon as may be, but this term is to have a reasonable and practicable construction, and the repair is to be made as soon as the magnitude of the work, the opportunity of procuring materials, and other circumstances necessarily connected with such a work will admit.—*Briggs vs. Guilford*, 264.

3. *Quere*—Are towns bound to open, when practicable, any by-way around a bridge, while repairing? *Ib.*

4. If such by-way be voluntarily opened by the town, they are bound only to make the same as safe and good as the temporary purpose for which it is made would reasonably require, *Ib.*

5. Injuries in any measure owing to the plaintiff's want of ordinary care, are not the foundation of an action, *Ib.*

6. A town officer cannot recover pay for his services unless by express vote of the town or what is equivalent.—*Boyden vs. Brookline*, 284

*Dubitatur*, whether a constant usage in relation to that particular office, from year to year, will impose any obligation upon the town to pay such officer, where no express vote has been had to that effect. *Ib.*

7. The contemporaneous construction of a statute, and long established practice under it, give an exposition of its spirit and intention, which courts are not at liberty to depart from, *Ib.*

8. Towns, at the annual March meeting, or at the adjourned term of the same in April, may transact any business within the scope of their corporate interests, whether the subject matter of the business is named in the warrant for the meeting or not.—*Schoff vs. Bloomfield*, 472

9. If at such meeting, a town appoint an agent to compromise a disputed claim for damages on account of a road laid across plaintiff's land by the selectmen, such agent may refer the question of the amount to be paid, to arbitrators; and the town will be bound by the award. *Ib.*

10. If, after the award, and after the road is legally opened, the owner of the land keep the road fenced up, this does not avoid the award, but the town must resort to their remedy under the general laws, as in other similar cases, *Ib.*

See HIGHWAY, 1, 2.

**TRESPASS.**

1. If a judgment be paid on the issuing of the first execution, and the execution surrendered to one of the debtors as evidence of such payment, and he, by advice of a stranger, sue out a second execution, and arrest and commit another joint debtor in the same execution, without the knowledge or consent of the creditor, such debtor and stranger are trespassers.—*Pierson vs. Gale et al.* 509

**TRESPASSERS AB INITIO.**

1. If an officer, by direction of a creditor, attach a chattel, and the creditor put it to use, with the assent of the officer, they are both trespassers *ab initio*. The rule of damages, in such case, is not, of course, the value of the chattels, but is the injury actually sustained.—*Lamb et al. vs. Day et al.*, 407

**TROVER.**

1. If one intrusted with property for a particular use, which becomes impracticable, lend the property to another who had knowledge of the facts, this is in both a conversion of the property.—*Rice vs. Clark*, 109

2. If a person intrusted with property for a particular use be guilty of any abuse of the

property in that use, he is not on that account liable to an action of trover. *Ib.*

3. A person, who under color of a licence, takes property for another purpose, or who takes property after the licence is recalled, is liable in trover. And it makes no difference that the plaintiff might have elected to hold it as a sale and delivery to a third person, instead of a conversion by the defendant.—*Holland vs. Cutter et al.*, 275

4. In trover the mere assertion of ownership of property without in any way interfering with the property, or with the owner's right to control it, is evidence of a conversion.—*Irish vs. Cloyes et al.*, 30

5. A demand and refusal is such evidence of a conversion, in trover, as cannot be judged or removed, by showing a subsequent attachment or by a distress made upon the same property and sale upon plaintiff's debt, but this will go in mitigation of damages. *Ib.*  
See RECEIPTS, 1.

### TRUSTEE PROCESS.

1. An action cannot be sustained against one as trustee, under the statute, merely because he is attorney for the absconding debtor, and has in his care a debt in the course of collection, against another person.—*Hitchcock vs. Edgerton*, 202

See PENSIONERS, 1.

### U

#### USURY.

1. If the defendant in a suit in chancery, brought to foreclose a mortgage, appears, claims that there is usury in the sum secured by the condition, has the same stricken out by the master in his report of the sum due, a decree passes for the sum actually due, and the orator takes possession of the premises mortgaged, he cannot maintain an action of ejectment against the mortgagor in the bill, or those claiming under him, on the ground that the mortgage was void on account of the usury.—*Ruble vs. Chaffee et al.*, 111

2. In a suit in the name of a common informer, to recover the penalty under the statute against usury, it must appear that the payment of money, or other thing sought to be recovered, was a voluntary payment, and made in pursuance of a previous corrupt agreement.—*Steward vs. Downer*, 320

3. A decree of the county court, in an action of ejectment predicated on mortgage, even after it becomes absolute and so the debt is paid, does not constitute such a payment as will enable the mortgagor or a common informer to recover the excess of lawful interest included in such decree. *Ib.*

4. By such decree it would seem, that the usury is purged, and no subsequent proceed-

ings can be had, whereby the question of usury shall be again brought into discussion. *Ib.*

5. If the contracting party never had a right of recovery under that statute, no action can accrue to a common informer, *Ib.*

### V

#### VALUE RECEIVED.

See ENDORSEMENT, 1.

#### VERDICT.

1. A want of alleging a special demand when necessary; is cured by verdict.—*Bliss et al. vs. Arnold et al.*, 252

See CONSIDERATION, 1.

SLANDER, 1.

ARREST OF JUDGMENT, 1, 2.

### W

#### WAIVER.

See ABATEMENT, 1.

#### WARRANTY.

1. In a case of warranty against all claims of a certain character, in case of a suit brought against the covenantor, he must notify the covenantor, or the judgment will be considered strictly *res inter alios acta*.—*Castleton vs. Miner*, 209

2. The warrantor may in such case contest the judgment on its original merits, and by showing it without just foundation, compel the covenantor to bear the loss of a payment made under it, as a voluntary payment. *Ib.*

3. But the covenantor may submit to pay the claim even without suit, and in that case will recover of the warrantor by showing it to have been a claim which he could not have resisted. *Ib.*

#### WITNESS.

1. If A conspire with B, an insolvent and irresponsible person, for the purpose of procuring property on the credit of B, for the common benefit of both, and to enable B to gain credit, A assists him to appear like a man of property, by which means B succeeds in purchasing goods on credit, which are shared between the two; in an action on the case against A, brought by a person thus defrauded of his property, B is a competent witness in support of the action.—*Brown vs. Marsh*, 370

2. A joint contractor, not a party to the suit, is interested to defeat the suit, and not a competent witness for defendant.—*Pike vs. Blake*, 400

3. To prove that a subscribing witness to a note signed by several signers was in fact only the witness to the first signature, it is not necessary first to call that witness.—*Harding vs. Coagie*, 509

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